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No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1974

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT H. BORK,
Solicitor General,
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The Solicitor General, on behalf of the Department and Secretary of the Air Force and the Superintendent, Commandant of Cadets and Executive for Honor and Ethics of the Air Force Academy, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–23A) is reported at 495 F. 2d 261. The opinion of the district court (App. C, *infra*, pp. 26A–38A) is not reported.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, pp. 39A–40A) was entered on March 29, 1974. A

timely petition for rehearing was denied on May 29, 1974 (App. B, *infra,* pp. 24A–25A). On August 20, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 26, 1974, and on September 16, 1974, he further extended the time to October 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exemption 6 of the Freedom of Information Act, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," covers all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."

2. Whether exemption 6 bars disclosure of summaries of proceedings against cadets at the Air Force Academy accused of violation of the Honor and Ethics Codes, because such disclosure would constitute "a clearly unwarranted invasion of personal privacy."

3. Whether the exemption from disclosure in exemption 2 of the Freedom of Information Act for matters "related solely to the internal personnel rules and practices of an agency" is inapplicable, as the court of appeals held, if the material has "a substantial potential for public interest outside the Government."

STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> * * * * *

STATEMENT

This is a suit under the Freedom of Information Act, 5 U.S.C. 552, to compel disclosure of summaries of Air Force Academy Honor and Ethics Code cases. The Air Force Academy Honor Code states: "We will not lie, steal, or cheat, nor tolerate among us anyone who does." The Code is administered through a Cadet Honor Committee, composed of cadets, which conducts hearings for cadets accused of Honor Code violations. The Honor Committee's "Procedures for Honor Hearing" state: " * * * all matters discussed at the hearing are confidential and should not be discussed * * * with anyone other than an Honor Representative [a cadet selected by his fellows to administer the Code]." (App. 105, 147, 165.)[1]

The Cadet Honor Committee summarizes the significant facts of each case in detailed written case summaries which are distributed "for official use only" within the Academy to Honor Representatives and others charged with administration of the Code, on a "need to know" basis. Similarly, the Ethics Committee at the Academy, composed of cadets, administers the Ethics Code and conducts Ethics Code hearings for cadets which are similarly confidential. The Ethics Code case summaries are also distributed solely within the Academy "for official use only." (App. 46, 164–165, 208, 215, 226, 234, 245, 252.)

Plaintiffs in this suit were law students seeking disclosure of the case summaries, with the names of cadets deleted, to use "in the form of footnotes for

[1] "App." refers to the joint appendix in the court of appeals, a copy of which is being lodged with the Clerk of this Court.

illustration" in a law review note on disciplinary procedures at the military academies (App. 212, 215). The case summaries will also be maintained for public inspection in the library of the New York University Law School (letter of plaintiffs' counsel to court of appeals concerning mootness, January 7, 1974). During lengthy interviews with plaintiff Rose, Academy officials gave him the Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures, and various other materials explaining the Honor and Ethics Codes (App. 207, 211, 214, 224). They denied access to the case summaries, however, because the summaries are so detailed that, even with the names deleted, "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given" and "[t]here is no way of determining just how these facts will or could be used" (App. 35, 211a).

The Superintendent of the Air Force Academy, the Commandant of Cadets and the Commandant's Executive for Honor and Ethics each filed in the district court affidavits stating that cadets who had been the subjects of Code hearings could be damaged for the balance of their lives if a reader connected the incident described in the case summary with a particular cadet (App. 35, 211a, 238, 244). See Rose, *A Prayer for Relief*, p. 106, n. 631 (New York University Law School, 1973).

The United States District Court for the Southern District of New York held that the case summaries are exempt from mandatory disclosure under exemption 2 of the Act, 5 U.S.C. 552(b)(2), as "matters that are * * * related solely to the internal personnel rules

and practices of an agency" (App. C, *infra,* pp. 33A–35A). On appeal, the appellees urged affirmance on that ground, and also reiterated their contention, rejected by the district court (App. C, *infra,* pp. 29A–32A), that the case summaries are exempt from disclosure under exemption 6 of the Act, 5 U.S.C. 552(b)(6), as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

A divided court of appeals reversed. The court held that the case summaries are not covered by exemption 2 because they "have a substantial potential for public interest outside the Government" and "have great impact on the lives and careers of subject cadets" and therefore are different "from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency' [Emphasis added.]" (App. A, *infra,* pp. 7A–8A).

The court recognized that the case summaries are "personnel" or "similar" files within the meaning of exemption 6, and that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (App. A, *infra,* pp. 10A–13A). But the court held that exemption 6 was inapplicable to the case summaries in view of its "narrow" reading of the exemption, and the need to "compromise between individual rights 'and the preservation of public rights

to government information' " (App. A, *infra,* pp. 5A–9A, 15A).

Since the appellees had failed to "carry th[e] burden" of establishing the applicability of exemption 6, the court required the Academy to "produce the summaries themselves in court" for *in camera* inspection. The court stated that it is "highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient * * * to safeguard affected persons in their legitimate claims of privacy," by deleting names and "personal references and all other identifying information" (App. A, *infra,* pp. 14A–15A).[2]

Judge Moore dissented on the ground that the majority decision overrode the specific prohibition of exemption 6 by allowing plaintiffs to "pry into and seek to disclose the former transgressions of Air Force cadets," at a "time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched" (App. A, *infra,* pp. 18A–19A). Judge Moore also noted: "Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation" (App. A, *infra,* p. 22A).

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[2] The court also recognized that courts retain broad equitable power to decline to order disclosure which would damage the public interest, but held that the issue "is not a substantial one" in the context of exemption 6 "since the language of the exemption requires a court to exercise a large measure of discreation" (App. A, *infra,* p. 17A).

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REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions of statutory interpretation involving the scope of exemptions 6 and 2 of the Freedom of Information Act. The narrow interpretation that the court of appeals has given to those exemptions authorizes the disclosure of highly damaging and derogatory material in government personnel files. The decision permits such disclosure on the unsupported assumption that by excising names and other identifying information the particular individuals involved in the Air Academy Honor Code proceedings cannot be identified. The decision of the court of appeals, if allowed to stand, will defeat the intention of Congress to protect the confidentiality of government material which those two exemptions cover.

1. a. Exemption 6 of the Freedom of Information Act excepts from the Act's disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals read this exemption as covering only those personnel files whose disclosures would constitute "a clearly unwarranted invasion of personal privacy" (App. A, *infra,* pp. 10A, 12A–13A). We submit, however, that the determination whether disclosure would constitute such an invasion of personal privacy is required only in the case of "similar files," and that once it is determined that particular files are "personnel" or "medical," the judicial inquiry is at an end. In other words, in exemption 6 Congress itself made the determination that disclosure of "personnel and medical files" would constitute an impermissible invasion of personal privacy.

The summaries of the Honor and Ethics Code violations involved in this case are "personnel" files. They relate to conduct by the cadets at the Academy, and are the basis for disciplinary action such as involuntary resignation or expulsion. They are just as much a part of a cadet's "personnel" file as the records of his academic and military performance. As such, they are protected from disclosure by exemption 6.

Congress did not intend the courts, before applying exemption 6 to personnel files, to determine whether disclosure of those files would constitute "a clearly unwarranted invasion of personal privacy"—an inquiry which, the court recognized, "involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts" (App. A, *infra,* p. 10A).

b. The language of the exemption does not compel the court of appeals' interpretation of it. To the contrary, the more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material that should be protected against disclosure and that other files also may contain such material. It therefore provided for confidential treatment of other files that meet the nondisclosure standard that inheres in personnel and medical files—the protection against disclosure that would constitute a clearly unwarranted invasion of personal privacy. Congress certainly did not intend to

subject the millions of government personnel and medical files to the balancing standards and editing procedures applied in this case, as a condition to maintaining their confidential character.

Indeed, in the case of medical files, Congress was legislating in the light of the well-established privilege covering the confidentiality of the doctor-patient relationship. If exemption 6 covers only those medical files that meet the "clearly unwarranted invasion" standard for nondisclosure, many doctor-patient communications that hitherto have been confidential would be subject to disclosure. Congress did not intend exemption 6 to have that effect. If the invasion of privacy requirement that the court of appeals read into the personnel files portion of exemption 6 is correct, however, it also would cover the medical files portion of that provision.

c. The legislative history of exemption 6 confirms that Congress intended to provide complete protection for the confidentiality of personnel and medical files without requiring the government also to show that disclosure of material in those files would constitute a clearly unwarranted invasion of personal privacy. The report of the House Committee on Government Operations stated that exemption 6 excluded from disclosure "those kinds of files the disclosure of which *might* harm the individual. The exemption is intended to cover detailed Government records on an individual which *can* be identified as applying to that individual * * * " (emphasis added). H. Rep. No. 1497, 89th Cong., 2d Sess., p. 11. Congress intended that the Act would not be used to expose the "vast amounts of personal data" collected by the government "usually for limited purposes," such as "health, welfare, and selective service records [which] are highly personal to the person involved * * *." S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. The Senate Committee stated: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, *such as medical and personnel files*" (*id.* at 3; emphasis added).

d. Although, as shown below, permitting disclosure of the Honor and Ethics Code summaries is likely to have grave and unfair consequences for a large number of Air Force officers and cadets, it is doubtful whether the decision of the court of appeals could be limited to that particular group. Rather, the rationale of the court of appeals' decision is likely to be applied to permit disclosure of a wide variety of other government personnel files, including those of the "Veterans Administration, Department of Health, Education, and Welfare, Selective Service, etc." (S. Rep. No. 813, *supra*, at 9), which Congress intended to keep confidential when it enacted exemption 6.

2. If, contrary to our submission, the summaries are not personnel files or if the "clearly unwarranted invasion of personal privacy" requirement in exemption 6 applies to personnel files, the court of appeals nevertheless improperly required an *in camera* district court examination of the summaries to eliminate information that could result in identifying the cadets involved in the violations. The court of appeals' own analysis of the summaries shows that exemption 6

bars their disclosure. Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 81, 93–94.

The court of appeals apparently believed that the harm that might result to the cadets from disclosure of the summaries could be minimized or eliminated by the *in camera* screening and excision it ordered. It nevertheless recognized that even this procedure might not protect the cadets from disclosure of their involvement in the Code violations—a disclosure that could have a serious adverse impact upon their subsequent careers, both in the military and elsewhere.

The court stated that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (App. A, *infra*, p. 13A). As the court noted,

> [A] senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection. [App. A, *infra*, p. 12A.]

Similarly, the court recognized:

> [P]ublication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty [App. A, *infra*, p. 12A.]

The ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports and files is strikingly illustrated by the recent case involving government files relating to Ezra Pound. A researcher, who had received data connecting Ezra Pound from the files of the FBI, identified a number of individuals who had furnished data on Pound to the Bureau, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished to the researcher in an attempt to "redact" the files to avoid such identification (see The New York Times, Book Review Section, p. 47, April 21, 1974; 119 Cong. Rec. S9333–S9334 (daily ed., May 30, 1974)).

The reason that such "editing" of the data is likely to be ineffective in preserving the anonymity of the people involved is that where the entire group itself is relatively small, even a few details may enable people familiar with the subject to identify the particular individuals involved. The number of cadets in the Air Force Academy at any one time is sufficiently small that the Honor and Ethics Code summaries, even with significant deletions, are likely to be sufficiently suggestive and informative to enable those familiar with the Academy to draw accurate inferences concerning the identity of the cadets involved in the particular violations described.

Congress in exemption 6 did not intend to authorize the courts to require disclosure of files covered by that exemption on the basis of excision of "personal references and all other identifying information" in the files—a process which, by its very nature, cannot adequately protect the confidentiality that Congress wished to insure by exemption 6.

The court of appeals stated (App. A, *infra*, p. 15A) that if the deletion of "personal references and all other identifying information" is, "in the opinion of the district judge," "not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants." This statement is inconsistent with the court's own view that it is "highly likely" that such deletion would be adequate to accomplish that objective—a view reflecting the court's belief that exemption 6 constitutes "a workable compromise between individual rights 'and the preservation of public rights to government information'" (App. A, *infra*, pp. 14A–15A). Despite the court of appeals' suggestion that the district court ultimately might decline to disclose some of the summaries, the practical effect of its decision will be to permit disclosure of material that Congress intended to keep confidential pursuant to procedures that Congress did not contemplate.

The probable result of the court of appeals' decision in this case would be a serious violation of the right of privacy of a large number of cadets at the Air Force Academy. This case, therefore, implicates an additional factor beyond the usual Freedom of Information Act case, in which the competing considerations are the public interest (1) in obtaining information

about the government and (2) in avoiding disclosure that may interfere with the proper functioning of government. In exemption 6 of the Freedom of Information Act, Congress expressly undertook to protect the constitutional right of privacy (see *Roe* v. *Wade*, 410 U.S. 113, 152). Congress did not intend to permit the serious invasions of that right which are likely to be the consequence of the court of appeals' interpretation of that exemption.[3]

3. Exemption 2 excepts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The court of appeals ruled that this exemption was inapplicable here because the case summaries "have a substantial potential for public interest outside the Government" (App. A, *infra*, p. 8A). The court's apparent rationale was that because of that potential the summaries do not relate "solely" to internal personnel rules and practices (*ibid.*). This ruling rests upon a misinterpretation of exemption 2, and reads into the exemption a qualifi-

[3] Compare *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F. 2d 73 (C.A.D.C.), where the court of appeals, in dealing with the category of "similar" files, instructed the district court on remand to "reconsider and reevaluate" a government affidavit which contended that the files contained personal information so detailed that the privacy of the named individuals could not be adequately protected by a deletion process (*id.* at 78). In contrast to the Second Circuit's view that exemption 6 must be given a "narrow" construction (App. A, *infra*, pp. 5A, 9A), the District of Columbia Circuit declared that exemption 6 is "phrased broadly to protect individuals from a wide range of embarrassing disclosures" (498 F. 2d at 77). The files involved there were statements of and records concerning persons who had allegedly been discriminated against by the Farmers Home Administration.

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cation that Congress did not include and that would seriously weaken it.

The fact that particular government documents relating to internal personnel rules and practices may "have a substantial potential for public interest outside the Government" does not change their character as matters that relate "solely" to those rules and practices. There frequently will be substantial public interest in matters that relate "solely" to internal agency personnel rules and practices. The standard Congress promulgated to protect the confidentiality of those rules and practices, however, is whether the matters sought to be disclosed relate "solely" to them and not whether there may be a substantial public interest outside the government with respect to them.[4]

The present case illustrates this distinction. The Honor and Ethics Code summaries are written by cadets for use by other cadets and Academy officials in connection with the operation and administration of the Academy and the maintenance of the voluntary Honor and Ethics Codes. The codes provide the standards by which the cadets guide their own conduct while at the Academy. The Code hearings are confidential—attended solely by cadets and appropriate Academy officials.

The case summaries thus relate "solely to the internal personnel rules and practices" of the Academy.

[4] This analysis equally applies to the court of appeals' reasoning that the case summaries do not relate "solely" to internal personnel rules and practices for the additional reason that they "have great impact on the lives and careers of subject cadets" (App. A, *infra*, p. 8A).

They involve the discipline, training and fitness of candidates. They are administered and enforced by the cadets themselves and exist wholly apart from the formal system of courts martial and the Uniform Code of Military Justice (App. 29–30, 144, 147, 164–165, 173, 208, 225, 226, 234).

The character of the Code summaries as matters that relate solely to the Academy's internal personnel rules and practices is not altered by the fact that there may be substantial public interest in the way the Codes operate. Such public interest also exists with respect to other types of government internal procedures that the legislative history of exemption 2 shows Congress specifically intended it to cover, such as the Treasury Department's instructions for the proper conduct of a "stakeout" or the manuals instructing auditors of government contractors how to detect irregularities.[5] That consideration, however, does not except such material from the coverage of exemption 2. The unwarrantedly narrow interpretation given to exemption 2 by the court of appeals in this case would severely limit the confidentiality of agency documents Congress intended to protect.

[5] H. Rep. No. 1197, 89th Cong., 2d Sess., p. 10; Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law), 89th Cong., 1st Sess., p. 29; 112 Cong. Rec. 13659; *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.), reversed on other grounds, 484 F. 2d 1086 (C.A.D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
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DONALD ETRA,
Attorneys.

OCTOBER 1974.

APPENDIX A

United States Court of Appeals For the Second Circuit

No. 9—September Term, 1973

(Argued October 29, 1973 Decided *March 29, 1974.*)

Docket No. 73–1264

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE P. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

against

DEPARTMENT OF THE AIR FORCE, ROBERT S. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Before: MOORE, HAYS, AND FEINBERG, Circuit Judges

Appeal from decision of United States District Court for the Southern District of New York, Lloyd

F. MacMahon, *J.*, granting partial summary judgment to defendants in a lawsuit under the Freedom of Information Act, 5 U.S.C. § 552.

Reversed and remanded.

BARRINGTON D. PARKER, JR., New York, N.Y. (American Civil Liberties Union Foundation; John H. F. Shattuck, Melvin L. Wulf, Sanford Jay Rosen, on the brief), *for Plaintiffs-Appellants.*

LEONARD SCHAITMAN, Assistant Chief, Appellate Section, Department of Justice, Washington, D.C. (Harlington Wood, Jr., Assistant Attorney General; Donald Etra, Attorney, Department of Justice; Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William R. Bronner, Gerald A. Rosenberg, T. Gorman Reilly, Assistant United States Attorneys, on the brief), *for Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

We are faced in this case with construing two of the exemptions in the Freedom of Information Act ("the Act"), 5 U.S.C. § 552, one of the many recent federal statutes that bring new and difficult cases into the federal courts.[1] As is frequently the case with such legislation, we have little to guide us in the way of precedent, and the brevity and generality of the statutory formulations leave much to be decided by the courts.

I

Appellant Michael T. Rose, a graduate of the United States Air Force Academy ("the Academy") was—at the time this complaint was filed—a third year student at the New York University Law School and

[1] See *Associated Indus. of N.Y.S., Inc.* v. *United States Dep't of Labor*, 487 F. 2d 342, 344–45 & n. 1 (2d Cir. 1973), and statutes cited therein.

a member of the Law Review. Together with other students and members of the Review, Rose has been conducting a survey of disciplinary systems at various Service Academies; the study is slated for publication in a forthcoming issue of the Review.[2] In order to document discussion of the Academy's Honor and Ethics Codes, Rose asked the Academy in autumn 1971 to give him copies of case summaries of Honor and Ethics Code adjudications, which were kept in the Academy's files. The Department of the Air Force refused on the ground that these summaries are exempted from compulsory release by 5 U.S.C. § 552 (b)(6), which permits an agency to withhold certain information to avoid unwarranted invasion of privacy.[3]

After exhausting his administrative remedies, Rose joined with appellants Charles P. Diamond and Lawrence B. Pedowitz (who were then, respectively, the current and former Editor-in-Chief of the Review) in this lawsuit under the Act to compel disclosure of the disputed items "with personal references or other identifying information deleted * * *." Judge Lloyd F. MacMahon of the United States District Court for the Southern District of New York granted appellees (collectively the Agency) summary judgment on the issue of the case summaries.[4] Although ultimately rul-

[2] Its tentative title is "The Administrative Adjudicatory Systems of the Service Academies: Constitutional Powers and Limitations."

[3] The Air Force also relied on the corresponding Air Force Regulations, A.F.R. 12–30.4f and 12–30.4g(1)(b), 32 C.F.R. § 806.5 (f), (g)(1)(ii) (1972).

[4] The district court granted appellants summary judgment with regard to the third item requested, a complete study of resignations by Academy graduates from the Air Force. Appellees have already complied with this portion of the court's directive, and thus do not appeal from it.

ing against appellants, the judge agreed with them in large part. The Agency put forth two grounds in the district court to support its non-production of the documents: the Act's "personal privacy" exemption, referred to above, and the court's "equitable discretion" to deny disclosure. The judge rejected both arguments. However, he ruled for appellees on a third ground not advanced by them, that the summaries were covered by the exemption in 5 U.S.C. § 552(b)(2) for an agency's internal rules and practices. Attacking the district court's order refusing them access to the summaries, appellants prosecute this appeal. We reverse and remand for further proceedings conforming with this opinion.

II

We begin by stressing that the Freedom of Information Act [5] was passed in an effort to cure the defects of former section 3 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 1002 (1964), which "was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." [6] Courts have noted that the Act's remedial purpose was to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny. See, e.g.,

[5] 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. § 552.

[6] *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79 (1973). See also S. Rep. No. 813, 89th Cong., 1st Sess. 3, 4–6 (1965) [hereinafter Senate Rep.]; H.R. Rep. No. 1497, 89th Cong., 2d Sess. 4–6 (1966) [hereinafter House Rep.]; Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, quoted in 20 Admin. L. Rev. 263–316, at 267–68 (1968). See generally Note, The Freedom of Information Act: Shredding the Paper Curtain, 47 St. John's L. Rev. 694 (1973) [hereinafter St. John's Note].

Haukes v. *Internal Revenue Service*, 467 F. 2d 787, 791 (6th Cir. 1972); *Bristol-Myers Co.* v. *FTC*, 424 F. 2d 935, 938, (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). They have accordingly held that exemptions must be narrowly construed. *Vaughn* v. *Rosen*, 484 F. 2d 820, 823 (D.C. Cir. 1973), cert. denied, 42 U.S.L.W. 3520 (U.S. March 19, 1974); *Soucie* v. *David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1971). This liberal reading of the Act's disclosure provisions is supported not only by legislative history but, more importantly, by the statutory language, as well. The Act mandates release of documents to "any person" [7] (subject to explicitly defined exemptions),[8] grants to the district courts jurisdiction to enjoin improper withholding after a hearing "de novo" in which "the burden is on the

[7] Former section 3 of the APA, 5 U.S.C. § 1002 (1964), provided for disclosure only "to persons properly and directly concerned." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765 (1967) [hereinafter Davis].

[8] 5 U.S.C. § 552(b) lists the exemptions from compulsory disclosure. It states: "This section does not apply to matters that are—(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological and geophysical information and data, including maps, concerning wells."

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agency to sustain its action," 5 U.S.C. § 552(a)(3); and further calls for disclosure "except as *specifically* stated in this section." 5 U.S.C. § 552(e) (emphasis added).[9] With this background in mind, we turn to a discussion of the applicability of Exemption Two, 5 U.S.C. § 552(b)(2), the provision thought by the district court to support the Agency's refusal to turn over the contested summaries to appellants.

As already indicated, until the district court ruled none of the appellees had thought to rely on Exemption Two in refusing to turn over the case summaries. That section of the Act, see note 9 supra, shields from required disclosure all "matters that are * * * related solely to the internal personnel rules and prac-

[9] 5 U.S.C. § 552(a)(3) reads as follows: "Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and expedited in every way." 5 U.S.C. § 552(c) provides: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this action. This section is not authority to withhold information from Congress."

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tices of an agency * * * ." In some instances, the scope of the exemption may be open to considerable doubt since the Senate and House Reports diametrically clash.[10] The former cites as examples of excluded material "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." Senate Rep. 8. The latter, on the other hand, exempts from disclosure "[o]perating rules, guidelines, and manuals of procedure for Government investigators or examiners" but not "'matters of internal management such as employee relations and working conditions and routine administrative procedures * * *.'" House Rep. 10. The Senate Report is thought by many to comply with the statutory language better than the House Report, whose thrust is most frequently toward nondisclosure.[11] This court has not yet taken a firm stand on the issue Cf. *Frankel* v. *SEC*, 460 F. 2d 813, 816 & n.5, cert. denied, 409 U.S. 889 (1972); *Polymers, Inc.* v. *NLRB*, 414 F. 2d 999, 1006 (1969), cert. denied, 396 U.S. 1010 (1970). We conclude, however, that the difference of approach between the House and Senate Reports would not affect the result here.

If we adopt the Senate construction of Exemption Two, case summaries of Honor and Ethics Code adjudications clearly fall outside its ambit. Such sum-

[10] See generally Project, Federal Administrative Law Developments—1972, Developments Under the Freedom of Information Act—1972, 1973 Duke L.J. 178, 187–89 [hereinafter Duke Project]; St. John's Note 716–17; Davis 785–86.

[11] Davis 762–63, 785–86; St. John's Note 697. See *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 794 (6th Cir. 1972), pointing out, inter alia, that the Senate Report furnishes the surer guide to congressional intent since it alone was before both Houses (the Senate passed the bill first); *Getman* v. *NLRB*, 450 F. 2d 670, 673 n.8 (D.C. Cir. 1971), and cases cited therein.

maries have a substantial potential for public interest outside the Government. Appellants have drawn our attention to various items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated—or at least enhanced—by acts of the Government itself. Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. Moreover, as we later describe in greater detail, see Part III infra, the case summaries themselves have great impact on the lives and careers of subject cadets. Both of these factors—the legitimate public interest and the future effect on cadets—differentiate the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate "*solely* to the internal personnel rules and practices of an agency." [Emphasis added.]

Similarly, even the House Report, which is usually more agency-oriented, does not sanction withholding the summaries. As we have already noted, the House Report in this respect seems to permit greater disclosure of "matters of internal management," except where knowledge of administrative procedures might

help outsiders to circumvent regulations or standards.[12] Release of the summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes at the Academy.

Speculating about a different kind of threat to the effectiveness of the Code, the Agency claims that publication of this material might gravely undermine the whole basis of the Honor Code system, whose proceedings are cloaked in confidentiality. The matter of confidentiality is further discussed in Part III infra. It is enough here to point out that appellants have sought only "sanitized" versions of the case summaries with names "or other identifying information" removed. In response to the redaction point, the Agency argues "that there is no way in which the total success of the deletion process can be guaranteed" and that "the functioning of the Honor and Ethics Codes would be seriously impaired even if inadvertent disclosure is a mere possibility."[13] But "total success"—in editing, as in anything else—is an impossible standard and surely not one imposed by a statute based upon a general philosophy of full agency disclosure to the public. Given this policy, as well as the injunction to construe exceptions to the Act strictly, 5 U.S.C. § 552(c), we think it clear that the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption.

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[12] See, e.g., *Tietze* v. *Richardson*, 342 F. Supp. 610 (S.D. Tex. 1972) (Social Security claims processing guidelines); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D. D.C. 1972) ("play-book" parts of contract audit manual), remanded sub nom. *Cuneo* v. *Schlesinger*, 484 F. 2d 1086 (D.C. Cir. 1973); *Concord* v. *Ambrose*, 333 F. Supp. 958, 960 (N.D. Cal 1971) (law enforcement agent training manual) (dictum).

[13] Appellees' brief at 26 & n.9.

III

The Agency also argues that the summaries sought by appellants fall within the purview of Exemption Six of the Act, 5 U.S.C. § 552(b)(6), which covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *." As already indicated, Judge MacMahon did not agree with appellees on this point, but they renew their argument in this court. On its face, Exemption Six appears relevant; we are dealing here with "personnel" or "similar files." But the key words, of course, are "a clearly unwarranted invasion of personal privacy," a wholly conclusory phrase, which requires a court to apply the statutory standard without any definite guidelines. Under these circumstances, precedent lends only marginal aid. Each case involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts.

The data pertinent to our inquiry concern the characteristics and use of the Honor and Ethics Code case summaries. These, the Agency tells us, are extracts of the significant facts in each case heard by the Honor Committee and in some important cases heard by the Ethics Committee. (The Ethics program is administered more informally.) As a matter of custom and procedure, information regarding such cases is required to be held in the strictest confidence. The summaries are, however, posted in the forty squadrons and, upon their official release, Honor Representatives are permitted to discuss any feature of the cases with the cadets for their education. The documents are also distributed to Academy personnel

who have a "need to know." (In not guilty or so-called "discretion"[14] cases the name of the accused is deleted; in guilty cases it is not.) Therefore, in practice, the curtain of confidentiality appears to shield these records from the glare of external publicity but not from the eyes of present cadets—and future ones, who can read the summaries of past proceedings in the Honor and Ethics Code reading files.

These being the facts, one might ask in what way release of the summaries—with names omitted—could increase the potential for invading the privacy of affected cadets. To be sure, some cases might be recognized by readers of the Law Review article even in the absence of names, by virtue of the circumstances alone. However, it can be argued, only current and former cadets and Academy official possess the frame of reference which would enable them to reconstruct the incidents described in the summaries, for only they had access to these records originally. Under these conditions, one might conclude that disclosure of the summaries poses no greater threat to privacy than the Academy itself countenanced through limited distribution and official posting of the items, and that it therefore constitutes no "invasion" at all. This reasoning was substantially the basis of the district court ruling that Exemption Six did not bar disclosure.

This approach, however, ignores certain practical realities. First, a person's privacy may be as effectively infringed by reviving dormant memories as by

[14] The Honor Reference Handbook of the Air Force Cadet Wing states that, by vote of six out of eight Honor Representatives, a cadet may be found guilty with discretion and returned to the Wing in good standing. A discretion vote indicates a "conviction that the man has learned a lifelong lesson and that he will thereafter uphold the ethical standards of the Wing." Honor Reference Handbook 44 (1970).

imparting new information.[15] Cf. Prosser on Torts 827–28 (4th ed. 1971). For example, a senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection.

Then, too, publication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty. Finally, we must remember that none of the parties to this lawsuit is committed first and foremost to the interests of affected cadets. It is no slur on appellees to note that they are primarily defending the integrity of their own procedures while appellants, of course, are pressing for disclosure. In these circumstances, we will not hold that the Agency's internal dissemination of the summaries lessens the concerned cadets' right to privacy, as embodied in Exemption Six.

However, while release of even nameless case histories might constitute an "invasion" of protected interests, the inquiry does not end there. The statute

[15] But cf. A.F.R. 12–30.g(2)(a), 32 C.F.R. § 806.5(g)(2): "In determining whether the release of information would result in a clearly unwarranted invasion of privacy, consideration should be given, in cases such as those involving alleged misconduct, to: (i) The amount of time that has passed since the alleged misconduct * * *."

requires the Agency to show that the invasion is "unwarranted"—indeed, that it is "clearly" so. The only opinion at all in point, *Getman* v. *NLRB*, 450 F. 2d 670 (D.C. Cir. 1971), held that law professors engaged in an NLRB voting study could compel that agency to provide them with names and addresses of eligible employee voters since disclosure would not entail an impermissible intrusion into privacy.[16] But *Getman* was a much stronger case for plaintiffs than ours since release of the desired information would subject the employees named to nothing more than a telephone request to submit to a voluntary interview. 450 F. 2d at 674–75. Here, by contrast, identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends. Viewing this potential for serious harm from the perspective of our society's expanding concern for the protection of privacy, cf. *Roe* v. *Wade*, 410 U.S. 113 (1973), we refuse to hold that appellees must now, without any prior inspection by a court, turn over the summaries to appellants with only the proper names removed. Such a procedure—posing, as it does, grave risks to the reputations of affected cadets—might "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

In order to keep faith with the Act's overall mandate, however, we equally decline to hold at this time

[16] See Note, Invasion of Privacy and the Freedom of Information Act: *Getman* v. *NLRB*, 40 Geo. Wash. L. Rev. 527 (1972). We have found only three other appellate decisions dealing with Exemption Six, only one of which—*Robles* v. *Environmental Protection Agency*, 484 F. 2d 843 (4th Cir. 1973)—reaches the merits of the claim. Cf. *Ackerly* v. *Ley*, 420 F. 2d 1336 (D.C. Cir. 1969): *Tuchinsky* v. *Selective Serv. Sys.*, 418 F. 2d 155 (7th Cir. 1969).

that Exemption Six Covers all, or any part of, the summaries in issue. Rather, we follow appellants' alternative suggestion and remand with instructions to the district court to conduct an in camera inspection of the Honor and Ethics Code case histories, which it has never examined. *Hawkes* v. *Internal Revenue Service,* 467 F. 2d 787 (6th Cir. 1972); *Soucie* v. *David,* 448 F. 2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co.* v. *FTC,* 424 F. 2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970). Under 5 U.S.C. § 552(a)(3), see note 9 supra, the "burden" was on the Agency "to sustain its action" in failing to make the case summaries available. Having failed to carry that burden of justification under Exemption Six in the trial court by means of affidavits or testimony, the Agency must now produce the summaries themselves in court. *Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 93 (1973), and cooperate with the judge in redacting the records so as to delete personal references and all other identifying information. Cf. 5 U.S.C. § 552(a)(2).[17] The practice of furnishing abstracts of cases, while preserving anonymity, is not unknown to the law.[18] We think it highly likely that the combined skills of court and Agency, applied to the summaries,[19] will yield edited documents sufficient for the purpose sought and sufficient as well to safeguard affected persons in their legitimate claims of privacy.[20]

[17] This section, which requires, inter alia, publication of final opinions, statements of policy and administrative staff manuals, contemplates agency deletion of identifying details "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy * * *."

[18] See, e.g., Revenue Rulings collected in Cum. Bull. of the IRS: ABA, Opinions on Professional Ethics (1967).

[19] It was estimated at oral argument that there were 100–200 summaries.

[20] Cf. House Rep. 11: "The exemption [six] is * * * intended

We cannot close this section of the opinion without one further comment. We have read our brother Moore's dissent with a sense of wonderment, since it states that we place our "stamp of approval upon" an "egregious invasion of constitutional rights of privacy." We, of course, do no such thing. We have refused to hold, in the third paragraph before this one, that the Agency is required, without any prior inspection by a court, to turn over the summaries to appellants with only the proper names removed. In addition, we have stated immediately above that personal references and all other identifying information should be deleted from the case summaries. If, in the opinion of the district judge, this is not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants. Obviously, the problem would be a simple one if the Freedom of Information Act did not exist or if the only interest to be considered were that of the cadets. But construing Exemption Six is a much more complex process than is indicated by the dissent which fails to refer to the legislative history of the Act, the policy behind it or the cases construing it. In any event, we believe that the in camera procedure required here will further the statutory goal of Exemption Six: a workable compromise between individual rights "and the preservation of public rights to government information." House Rep. 11.[21]

to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of *unidentified statistical information from personal records.* [Emphasis added.]

[21] Moreover, despite the dissent's gloomy prediction, we do not envision a need for dozens of hours of hard labor by judicial and military officers. On the contrary, once agreement is reached on general principles of reduction, the actual process of editing the summaries should not take undue amounts of time.

IV

As a final point, the Agency contends that the courts have a broad equitable power to decline to order release when disclosure would damage the public interest, and urges that we exercise this jurisdiction to withhold the summaries completely. Judge MacMahon rejected this argument, holding that Congress did not leave to the courts a general option of refusing to enforce the Act's requirement of disclosure even though no statutory exemption applies.

Much ink has been spilled on this issue, both by courts and commentators, and we are told that the legislative history is indeterminate [22] and that the appellate decisions are divided.[23] We are not sure how real the conflict is in most instances, since even the courts that are cited as opposing the notion of general equity power to refuse disclosure recognize that a truly exceptional case might require it. *Tennessean*

[22] Compare House Rep. 9 with Senate Rep. 3.

[23] Thus, Duke Project 178–79 n.9 states that the Fourth, Sixth and D.C. Circuits reject the idea of a general equitable jurisdiction and the Fifth and Ninth Circuits support it. Compare *Robles* v. *Environmental Protection Agency*, 484 F. 2d 843, 847 (4th Cir. 1973); *Tennessean Newspapers, Inc.* v. *Federal Housing Administration*, 464 F. 2d 657, 661–62 (6th Cir. 1972); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 792 n.6 (6th Cir. 1972); *Wellford* v. *Hardin*, 444 F. 2d 21, 24–25 (4th Cir. 1971); *Getman* v. *NLRB*, 450 F. 2d 670, 677–80 (D.C. Cir. 1971); *Soucie* v. *David*, 448 F. 2d 1067, 1076–77 (D.C. Cir. 1971), with *Wu* v. *National Endowment for Humanities*, 460 F. 2d 1030, 1034 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); *Benson* v. *General Serv. Administration*, 415 F. 2d 878 (9th Cir. 1969). But cf. *Epstein* v. *Resor*, 421 F. 2d 930, 933 (9th Cir.), cert. denied, 398 U.S. 965 (1970) (limited role of courts under the first and third exemptions). Prof. Davis also believes in the existence of equitable power to refuse disclosure. Davis 767.

Newspapers, Inc. v. *Federal Housing Administration*, 464 F. 2d 657, 662 (6th Cir. 1972); *Soucie* v. *David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). It may be that the true controversy is over the definition of an exceptional case, since we are clear that generally the Act constrains the use of broad judicial discretion to *block* disclosure. Cf. *Renegotiation Board* v. *Bannercraft Clothing Co.*, 42 U.S.L.W. 4203, 4206–09 (U.S. Feb. 19, 1974) (dictum—broad equitable power to enforce the Act). In any event, in the context of Exemption Six the issue is not a substantial one, since the language of the exemption requires a court to exercise a large measure of discretion. This was pointed out by the Court of Appeals for the District of Columbia, a court frequently cited for the view that the federal courts have no general equitable jurisdiction to refuse disclosure when no exemption applies:

> Any discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies * * *. But Exemption (6), by its explicit language, calls for such balancing and must therefore be viewed as an exception to the general thrust of the Act. S. Rep. at 9, explains:
>
> "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. * * *"

> We note in passing that no other exemption specifically requires balancing. In view of the Act's basic purpose to limit discretion and encourage disclosure, we believe that Exemption (6) should be treated as unique, and that equitable discretion should not be imported into any of the other exemptions * * *.

Getman v. *NLRB*, 450 F. 2d 670, 674 n. 10 (1971).

We have already decided that disclosure of the case summaries would not be "a clearly unwarranted invasion of personal privacy" under Exemption Six, if the summaries are redacted as set forth above. We agree with the court in *Getman* that no further balancing is necessary.[24]

Accordingly, we reverse and remand for further proceedings, consistent with this opinion and expedited pursuant to the command of 5 U.S.C. § 552 (a)(3).

MOORE, *Circuit Judge* (dissenting):

I must express a most vigorous dissent to the majority's judicial stamp of approval upon the egregious invasion of constitutional rights of privacy which their opinion authorizes. At a time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched, when much is being said and written about prison rehabilitation, I am amazed that any court should countenance—much less authorize—the curiosity satisfying efforts of three law school students who, merely to write a Law Review note, would

[24] While this case was under advisement, we asked the parties to brief the question of mootness, in view of the possibility that publication of plaintiffs' article would moot the issue. In their response, both sides affirmed their belief that the matter of disclosure of the case summaries was still properly before us. We agreed with this conclusion and therefore proceeded to consider the case on the merits.

pry into and seek to disclose the former transgressions of Air Force cadets. This is not a case in which the courts can attempt to justify their interposition on the theory that Congress has failed to act and that, therefore, the courts must legislate. Here there is a definite statute of prohibition which the majority now overrides.

When an Air Force cadet is accused of lying, stealing or cheating at the Academy, he is protected by the greatest possible confidentiality. This may arise in part from the fact that this charge has been made possible by the principle of toleration which in grammar schoolyard parlance means "tattletale" or as phrased in the record as "The backbone of the Honor Code is the toleration clause which requires that every cadet report any suspected violation of the Code" (App. 120). Thus, not only must the cadet be protected but also the non-tolerator (tattler).

The hearings, as would be expected, are as sacrosanct as are (or should be) jury room proceedings, namely, "all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative" (App. 164–65). The summaries of each case are kept confidentially restricted except in a small area.

In Passing the Freedom of Information Act, 5 U.S.C. § 552, Congress carefully and specifically excluded from public gaze:

> "(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

If doctor-patient files are protected, how much the more should files dealing with quasi-criminal or possible character-besmirching facts be kept secret. The disclosure of disease, be it venereal or mental, can be

remedied or cured. The drawing of a bar sinister across the escutcheon of a young man entering upon his life's career, cannot be erased.

The Air Force officials, mindful of their duty to protect their cadets, responded in a manner which should have received the highest judicial commendation instead of disapproval. The Academy's Honor and Ethics Executive, in rejecting plaintiffs' request for the case summaries, stated:

> "I regret that Academy policy requires denial of public access to honor case files, including selected ones in the Honor Code Reading Files. All of these cases are documented as 'For Official Use Only' and are disseminated for internal use only to the Honor Representatives and those few staff personnel who have a continuing need to understand the working of the Cadet Honor Code. It would be in poor faith with all cadets who have met honor hearings to allow their cases to come into the public eye. To permit the use of honor cases for such purpose would tend to set a precedent that may operate to the detriment of innocent persons.
>
> "To be accused or found guilty of an honor violation is an emotionally trying experience that should, in due respect for the rights of the individual concerned, be as limited as possible. Society in general does not understand the difference in the lying, cheating and stealing that constitutes a Cadet Honor violation as opposed to the degree of criminality required in society at large to cause an equally serious type of censor [sic: censure]. The problems of such misunderstanding and the unnecessary embarrassment that could result seems to exceed the value to be gained from making the case files available to the public."

In denying the request, the Commandant of Cadets stated (App. 30):

> "The Air Force Academy will be unable to provide you sample ethics cases. The sample ethics cases used in the Honor Code Reading File are designated 'For Official Use Only'. It is intended that these cases will be used for the edification of the Cadet Wing and Academy staff only. Indiscriminate release of this information to persons without a need to know could be counter to the best interest of the individuals concerned and the Air Force Academy."

When the request reached the Office of the Secretary of the Air Force, the futility of any attempted deletion was pointed out in the statement (App. 35):

> "A release of the honor hearing cases and ethics cases would constitute an unwarranted invasion into the privacy of former cadets of the Academy. Some cases may be recognized by the reader by the circumstances alone without the identity of the cadet given. This being the case then the reader could easily connect the incident with the particular cadet involved. Additionally, they are internal documents which are not meant for mass circulation. They are stamped 'For Official Use Only' and are afforded subscribed routing and handling procedures."

The reasons for confidentiality and non-disclosure cannot be better summarized than by the Commandant's Executive for Honor and Ethics, who stated:

> "There is no way of determining just how these facts will or could be used. This data could find its way to the relatives, friends and classmates of cadets and supply the missing link in disclosing the identity of a guilty cadet. No person who has made a mistake and been punished should have to have this mistake follow him for the rest of his life."

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And, indeed, merely to satisfy the desire of plaintiff to write a Law Review note, no court should aid and abet a project which could result in having a cadet's "mistake follow him for the rest of his life." (App. 211a).

Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation.

As the Commandant of Cadets so logically explained:

> "The use of these case files or write-ups, even if the identity of the individual were not given, could still be an invasion of privacy as the incident may have been so notorious that the reader would immediately recognize the cadet who was the subject of the Honor or Ethics Hearing. In certain instances, the Cadet Wing has given the Honor Committee the prerogative to grant discretion to a cadet who has been voted guilty and to allow him to return to the Cadet Wing. The man who has learned his lifelong lesson of honor can be a great asset to the Wing and to the Air Force. His retention is therefore not only justified; it is desired. . . . Therefore, every effort is made to avoid disclosure of the cadet's name so that he may return to the Wing unblemished to continue his education."

The majority recognize that their decision even with anonymous disclosure "could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." These accused cadets are the real parties in interest; yet, as the majority concedes, "none of the parties to this lawsuit is committed first and foremost to the interests of affected cadets." Even the unborn child is in many situations entitled to his

(or her) guardian *ad litem* and *Gideon*[25] was deemed to be entitled to be heard through counsel. But accused cadets are to be subjected to possible lifelong disgrace or loss of employment without any spokesman.

Of course, Congress never intended any such result. Nor does the Act so decree. Lest any implication to this effect might be gleaned therefrom, Congress wrote therein a specific prohibition against an "unwarranted invasion of personal privacy."

Consider briefly the majority's suggested protection against "this potential for serious harm". First, the Air Force must remove from all case summaries, estimated in open court as involving one hundred to two hundred summaries, all proper names. Then these nameless but not factless summaries are to be turned over to the District Court. There the majority are sure that "the combined skills of court and Agency, * * * will yield edited documents * * * sufficient * * * to safeguard affected persons in their legitimate claims of privacy." But for what purpose and at what cost? The purpose is clear, i.e., to have the Air Force and the District Court co-author a student contribution to a legal periodical. Time cost is another matter. Assuming only one hundred and fifty summaries, vital name excision should be capable of accomplishment in ten minutes per summary—an inconsequential twenty-five hours. However, careful Court editing to eliminate identifying facts would be much more time-consuming. Seventy-five hours of Court time would be conservative. In these days when there is so much clamor about the desirability of speedy trials, I am unwilling to subscribe to, or acquiesce in, any opinion which saddles such a needless burden upon an important branch of our military forces and, in my opinion, an equally important judicial branch. Hence, I dissent.

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[25] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

APPENDIX B

United States Court of Appeals, Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of May, one thousand nine hundred and seventy-four.

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Docket No. 73–1264

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellees, a poll of the judges in regular active service having been taken and there being no majority in favor thereof.

Upon consideration thereof, it is ordered that said petition be and it hereby is denied.

IRVING R. KAUFMAN,
Chief Judge.

United States Court of Appeals

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of May, one thousand nine hundred and seventy-four.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays, Hon. Wilfred Feinberg, Circuit Judges.

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS-APPELLEES

Docket No 73–1264

A petition for a rehearing having been filed herein by counsel for the appellees,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX C

United States District Court Southern District of New York

72 Civ. 1605–LFM

MICHAEL T. ROSE ET AL., PLAINTIFFS

against

DEPARTMENT OF THE AIR FORCE ET AL., DEFENDANTS

Memorandum

MACMAHON, *District Judge.*

These cross-motions for summary judgment are brought under the public information section of the Administrative Procedure Act,[1] commonly known as the Freedom of Information Act of 1966 ("the Act"). Plaintiffs seek to compel the defendants to produce certain documents and information generated in the United States Air Force Academy ("the Academy") pertaining to its disciplinary procedures. Section 3 of the Act places upon defendants the burden of justifying their refusal to produce documents or information sought pursuant to the Act and provides for a de novo evaluation by this court of the propriety of that refusal.

The items of information sought are: (1) case summaries of Honor Code adjudications collected in the Academy's Honor Code reading files, with personal references or other identifying information deleted; (2) case summaries of Ethics Code adjudications

[1] 5 U.S.C. § 552 et seq.

maintained in the Academy's Ethics Code reading files, with personal references or other identifying information deleted; and (3) a complete copy of a study of resignations from the Air Force by Academy graduates made by the Academy's alumni secretary.[2]

Plaintiffs, members and a former member of the law review of New York University Law School, seek this information for use in documenting a study of disciplinary procedures at the nation's service academies. Plaintiff Rose, a graduate of the Academy and a first lieutenant in the Air Force, requested and was denied access to all items listed above for such use. The grounds stated for the denial were that the materials sought were exempt from disclosure under Air Force regulations and federal law.[3]

The Honor Code is a synonym for the manner in which each cadet at the Academy voluntarily agrees to conduct himself: "We will not lie, steal or cheat, nor tolerate among us anyone who does." All four aspects of the cadet Honor Code are punishable under formal military law.[4] The procedures of the Code, however, provide an informal system of military justice that must be utilized before any other sanctions may be invoked. The Code may completely dispose of

[2] Since the institution of this suit, the Air Force has released to plaintiffs the statistical portion of item (3): the comments offered by the graduates are still withheld.

[3] The case summaries are allegedly exempt from disclosure under Air Force Regulations 12–30, 4f and 4g(1)(b) and 5 U.S.C. § 552(b) (5) and (6).

[4] Specific articles of the UCMJ which could apply vary with the circumstances, but include Articles 80, 92, 107, 121, 122, 123, 133, and 134.

cases and, therefore, obviate the need to resort to formal military law.[5]

Ethics cases involve some conduct indicating a lack of moral character and yet not constituting an Honor Code violation, *e.g.*, the writing of a bad check.[6]

Plaintiffs contend that they have a right, pursuant to 5 U.S.C. § 552(a)(3), to inspect and copy the Honor

[5] The Code is administered by a board of eight cadets, known as "the Honor Committee." Suspected violations of the Code are referred to the Chairman of the Honor Committee. He appoints a three-cadet investigatory team which, with advice from the legal advisor, evaluates the facts and determines whether a hearing before the Honor Committee is warranted. If the team finds no hearing warranted, the case is closed. If it finds there should be a hearing, each squadron may send two cadets to observe and the accused cadet may call witnesses to testify in his behalf.

The Honor Committee may reach a finding of guilty only upon an unanimous vote. If the verdict is guilty, the board may, under certain circumstances, grant the guilty cadet "discretion" for which a vote of 6 to 2 is required. A verdict of guilty without discretion results in three alternatives: the cadet may resign from the Academy, request a hearing before a Board of Officers, or request a trial by court-martial. A verdict of guilty with discretion is equivalent to a not guilty finding in that the cadet is returned to the cadet population in good standing.

At the announcement of the verdict, the Honor Chairman reminds all cadets present at the hearing that all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative. In not guilty or discretion cases, case summaries are written up with the name of the cadet deleted and posted on bulletin boards throughout the Academy. However, cadets are instructed not to read them unless they have a need, beyond mere curiosity, to know their contents. In guilty cases, official dissemination to the cadets is made after the guilty cadet has departed and his name is not deleted.

[6] Confidentiality of Ethics cases is established by custom and practice rather than by written rule. The procedures for handling Ethics cases are comparatively unstructured. In many

and Ethics Codes case summaries ("case summaries"). That statute requires that:

> [E]ach agency, on request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action.[7]

The government argues preliminarily that the Honor Committee and presumably the Ethics Committee (which administer the respective Codes) are not agencies within the intendment of the Act. We disagree. A branch of the armed services is an agency for the purposes of the Act.[8] The identification of Honor Code memoranda as "official Air Force records" by the Air Force's form of attestation of authenticity[9] demonstrates that the records belong to the Air Force and not to the Honor Committee.

The government's primary defense to the demands

instances, Ethics cases are handled informally by the Cadet Squadron Commander, the Squadron Ethics Representative, and the individual concerned. These cases are not necessarily written up and no complete file is maintained. A case is written up and placed in back of the Honor Code reading file only when it is determined to be of value for the Cadet population. For our purposes here, references to the Honor Code or Code will include the Ethics Code.

[7] 5 U.S.C. § 552(a)(3).

[8] *Epstein* v. *Resor*, 421 F. 2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

[9] These official printed forms, complete with blue ribbon and gold seal, cover a number of Air Force documents submitted in support of the government's motion.

for the case summaries is the sixth of nine exemptions to the Act:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy * * *.[10]

Plaintiffs respond that their request is for the case summaries "with personal references or other identifying information deleted." Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy.[11] It is only the identifying connection

[10] 5 U.S.C. § 552(b)(6). The government contends that the "information is both embarrassing and personal to the individual concerned and that the Air Force had a duty to respect, to the greatest extent possible, the rights of privacy of its personnel." Affidavit of Major Richard R. Lee, faculty member of the Academy, at page 2. The government then cites as relevant legislative history: "Such agencies as the Veterans' Administration, Department of Health, Education and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens * * *. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966) ("H. Rep."). The government stresses that since privacy is the "crucial" property of the Code, an adverse determination here would put the future of the Code in a "dubious" position as well as constitute a clearly unwarranted invasion of personal privacy.

[11] See, *Getman v. National Labor Relations Bd.*, 450 F. 2d 670 (D.C. Cir. 1971). The very section of the House Report cited by the government, which noted that this exemption was

to the individual that casts the personnel, medical and similar files within the protection of sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder to be released.[12]

The government argues that even with deletions, disclosure is an unwarranted invasion of personal privacy because:

> [T]here will be those, who, * * * may have considerable knowledge about a particular Code violation; perusal of the article * * * may well * * * provide the factual quantum necessary to identify a particular person as the one involved * * *. This would destroy the utility of the device of "discretion," the second chance with a clean slate.[13]

The government ignores, however, that the Honor Code precludes publication of any case summaries outside the Academy community. While it is possible that a reader, in conjunction with facts learned long since cadet days, might successfully conjecture about an

intended to cover "files containing intimate details about millions of citizens," goes on to state: "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records." H. Rep. at 11. The corresponding Senate Report makes the point even more clearly: "[H]ealth, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public." S. Rep. No. 813, 89th Cong., 1st Sess. 7 (1965) ("S. Rep.").

[12] 5 U.S.C. § 552(a)(2): "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details * * *." *E.g.*, *Wellford* v. *Hardin*, 315 F. Supp. 768 (D. D.C. 1970); *see*, *Getman* v. *National Labor Relations Bd.*, *supra*.

[13] Government's reply memorandum, at p. 8.

identity if he had not learned it when he was at the Academy, no one can be harmed. This hypothetical reader, necessarily once a cadet, has subscribed to the nature and workings of the Honor Code, including the philosophy of discretion. Even if "society" deems case summaries to be of a quasi criminal nature, no stigma could attach to a former cadet because no one outside the cadet/former cadet universe could possibly connect a name with a case.

Thus, we find that disclosure of the summaries without names or other identifying information is not an invasion of personal privacy, as proscribed by the sixth exemption.[14]

The government next argues that we follow *Consumers Union of U.S., Inc.* v. *Veterans Administration*,[15] "according to traditional equity principles" to "weigh the effects of disclosure and non-disclosure and determine the best course to follow at the present time." This mandate of the district court in *Consumers* is rejected by the Courts of Appeals and is contradictory to the language of the statute. One court stated:

> Since judicial use of traditional equitable principles to prevent disclosure would upset this this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.[16]

[14] It is unnecessary for us to proceed to the second step of the exemption of balancing the advantages to the public of disclosure with the disadvantages to the individual of intrusion because we have found that there could be no intrusion.

[15] 301 F. Supp. 796, 806 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F. 2d 1363 (2d Cir. 1971).

[16] *Soucie* v. *David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). *See also*, *Wellford* v. *Hardin*, *supra*; *Getman* v. *National Labor Relations Bd.*, *supra*.

Section 552(c) of the Act states:

> This section does not authorize withholding of information or limit the availability of records to the public, except as *specifically* stated in this section.[17]

The equitable discretion issue was neither briefed nor argued by either side in *Consumers*, and opportunity for a full review on the point was foreclosed when the appeal was dismissed as moot.[18] In any event, we are convinced that it is inappropriate to use equitable power to weigh the effects of disclosure and nondisclosure.[19]

Despite the failure of the two grounds discussed above to support the Air Force's attempt to keep from disclosing the case summaries, there exists a third potential basis not mentioned by either side which demands our consideration. The second exemption to the Act covers matters that are "related solely to the internal personnel rules and practices" of the agency.[20] The general frame of operation of the Honor and Ethics Codes, including the production of the case summaries, seems to fit into that category on its face. We, therefore, must examine whether such placement is consonant with congressional intent.

The Senate Report on the Act stated:

> Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like.[21]

[17] 5 U.S.C. § 552(c) [emphasis added].

[18] *Getman* v. *National Labor Relations Bd.*, *supra*, 450 F. 2d at 678 n. 25.

[19] *Id.* at 674 n. 10.

[20] 5 U.S.C. § 552(b)(2).

[21] S. Rep. at 8. A portion of the House Report would seem to exclude "employee relations and working conditions" from

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The examples of "personnel rules" in the report indicates a policy of non-disclosure of information which does not materially affect the public. By definition, these rules are meant to control only those people in the agency. The administrative difficulties from publication outweigh any possible benefit from disclosure.

The operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy.[22] While the Code is more substantial than parking facilities or lunch hours, the principle of affecting only those in the agency is the same. The examples in the report are illustrative, not limitary, and consequently do not restrict the exemption beyond the principle that documents exempted do not materially affect the public.[23]

---

the exemption. We reject this interpretation because it is not in accord with the expressed words of the statute. Moreover, the Senate Report is the surer indication of congressional intent because it was available for consideration in both houses while the House Report was available in only one. *Benson* v. *General Services Administration*, 289 F. Supp. 590 (D.D.C. 1968), *aff'd*, 415 F. 2d 878 (9th Cir. 1969).

Commentary on another portion of the House Report which expands the exemption to include operating rules is helpful, however, in that it points to the guideline we employ here in applying this exemption. "'Operating rules' may be 'internal personnel rules' only to the extent that they deal with the relations between an agency and an outsider or between employees of the agency and an outsider." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 785–786 (1967). Significantly for our purposes, the commentator warns that routine administrative procedures must be disclosed "if they affect anyone outside the agency." *Id*

[22] Even former cadets and former officers, as members of the public, cannot be affected by the case summaries due to the confidential nature of the Honor Code System. See notes 5 and 6 and text thereat.

We hold, therefore, that the Honor and Ethics Codes comprise rules and practices of the Air Force that affect only those within the Academy. Hence, the records of those proceedings, including the demanded case summaries, are exempt from mandatory disclosure under 5 U.S.C. § 552(b)(2).

The third item of information sought in this action is a complete study of resignations by Academy graduates. In view of the government's voluntary disclosure of the statistical half of this survey, we need only pass upon the half containing comments by Academy graduates.

The government maintains that the comments portion of the study is exempt from disclosure under the terms of the fifth exemption from the Act. It relieves from disclosure:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[24]

Plaintiffs contend that this study already has been offered for dissemination to the public and, thus, the government has waived its rights under this exemption. We agree. Lieutenant General Albert P. Clark, the Superintendent of the Air Force Academy, stated that:

---

[23] This interpretation is not foreclosed by the policy of construing exemptions narrowly. We can find no more narrow interpretation that would still permit the exemption to be viable. Protection from overly broad use of the exemption derives from the word "solely" in the statute, which narrows down the exemption to insure disclosure to the public of all information that may affect it. Here it is obvious that the Code exists "solely" to regulate the cadets.

[24] 5 U.S.C. § 552(b)(5).

> As a matter of fact the information [the study] has not been released to graduates or to the public for over a year.

It is uncontested that the complete survey was offered to all graduates at one time. Plaintiff Rose received a form letter, dated September 29, 1969, addressed to "All graduates" from the Academy offering the study to anyone who would "merely drop us a line." This letter from Captain Metcalf, author of the study, did not restrict the use of the study despite the assertion by Metcalf in his affidavit that the policy had been not to permit the use of the study in published reports. The entire relevant portion of the letter is set out in the margin.[25]

The government does not deny that the study was offered for public dissemination. In its reply brief, it contends that the studies originally were made available to all graduates as a matter of interest. In mid–1971, that policy was changed apparently because of a request for the study by a graduate in order to write an article for a national magazine.

In view of Lieutenant General Clark's attestation, it is inescapable that the study had in fact been distributed to at least some members of the public. Further, the admitted offer of release was not restricted to graduates still serving in the Air Force. Consequently, it is likely that the material remains available from sources other than the agency. Because of the other sources, the denial of disclosure here

[25] "5. The above discussion is only a short summary of the study that was published in May, 1969. If you wish a copy of the complete survey, merely drop us a line and we'll send one along. If you have any personal comments on the subject of graduate resignations, I would be very pleased to receive them. I would be particularly interested in your thoughts concerning actions Hq USAF can initiate that would directly address the major irritants of a career in the Air Force."

would either be ineffective or we would have to enjoin all holders of the study from disclosing it. As we are powerless to restrain the sources not before us, there is no effective way to keep the study secret.

The change and subsequent enforcement of the Air Force's policy regarding release of the study cannot undo the consequences of unrestricted publications. All reasons for exempting intra-agency communications from disclosure fail when that communication already has been deliberately released by the agency to the public. The study is no longer only an intra-agency matter. It is a matter of public record. A Maritime Subsidy Board intra-agency memorandum lost its status as such when it was reproduced in part in a letter sent outside the agency.[26]

We therefore find that the voluntary disclosure of the studies amounts to a waiver of the right to be protected by the fifth exemption.[27] Consequently, the exemption from disclosure claimed by the government must be denied.

[26] *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696, 703 (D. D.C. 1969). We cannot be sympathetic to a litigant because his timing with the barn door is off; the horse needs only to be let go once to be gone forever.

[27] Because the Air Force waived the study's status as an intra-agency memorandum, we need not reach the second criterion of the fifth exemption: the discoverability of the study as to a litigant other than an agency. We do note, however, that the publication would not adversely affect a litigant's discovery rights. A discoverer is not barred from discovery on matters that are within his own mind, within the knowledge of the general public or accessible to him. *United States* v. *Beatrice Foods Co.*, 52 F.R.D. 14 (D. Minn. 1971); *Baim & Blank, Inc.* v. *Philco Distrib., Inc.*, 25 F.R.D. 86 (E.D.N.Y. 1957); 4 J. Moore, Federal Practice ¶ 26.59 (1972). Whether or not the publication itself overcomes any claim of privilege lodged by the government under the discovery rules, thus making the information "discoverable" even had it not been so before, is a most interesting but unnecessary question for us here.

Accordingly, the government's motion for summary judgment is granted insofar as it exempts the Honor and Ethics Codes case summaries from disclosure and is denied in all other respects. Plaintiffs' cross-motion for summary judgment is granted insofar as it seeks to require the Air Force to disclose the complete study on graduate resignation with comments and is denied in all other respects.

Settle order on notice within fifteen (15) days.

Dated: New York, N.Y., December 19, 1972.

LLOYD F. MACMAHON,
United States District Judge.

APPENDIX D

United States Court of Appeals for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of March one thousand nine hundred and seventy-four.

Present: Hon. Leonard P. Moore, Hon. Paul R. Hays,
Hon. Wilfred Feinberg, *Circuit Judges*

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS-APPELLANTS,

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS–APPELLEES.

73–1264

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and they hereby are reversed and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO,
Clerk.

By VINCENT A. CARLIN,
Chief Deputy Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1974

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-489

DEPARTMENT OF THE AIR FORCE, ET AL.,
Petitioners

—v.—

MICHAEL T. ROSE, ET AL.

ON ~~PETITION FOR A~~ WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**PETITION FOR A WRIT OF CERTIORARI FILED ON
OCTOBER 25, 1974
CERTIORARI GRANTED FEBRUARY 18, 1975**

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-489

DEPARTMENT OF THE AIR FORCE, ET AL.,
Petitioners

—v.—

MICHAEL T. ROSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Date	Proceeding
April 19, 1972	Complaint Filed
June 30, 1972	Answer Filed
September 28, 1972	Defendants Notice of Motion for Summary Judgment and Supporting Documents
October 18, 1972	Plaintiffs Notice of Motion for Summary Judgment and Supporting Documents
December 18, 1972	Memorandum Opinion of Judge MacMahon Granting in Part and Denying in Part Cross Motions for Summary Judgment
January 5, 1973	Order of Judge MacMahon Granting in Part and Denying in Part Cross Motions for Summary Judgment
January 10, 1973	Notice of Entry Filed
January 18, 1973	Notice of Appeal Filed
March 29, 1974	Opinion and Judgment rendered by Court of Appeals for the Second Circuit
May 1, 1974	Appellees' Petition for Rehearing filed
May 29, 1974	Petition for Rehearing denied
June 5, 1974	Appellees' Motion for Stay of Mandate
June 18, 1974	Motion for Stay of Mandate granted

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

—against—

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

COMPLAINT

Plaintiffs Michael T. Rose, Charles P. Diamond and Lawrence B. Pedowitz, by their attorney Philip L. Graham, Jr. for their Complaint allege:

1. This is an action under the public information section of the Administrative Procedure Act, 5 U.S.C. § 522, *et seq.*, (the Freedom of Information Act of 1966) and the First Amendment to the Constitution. Plaintiffs seek an order and judgment of this Court enjoining defendants from withholding and requiring them to produce three items of information, two pertaining to disciplinary systems and procedures at the United States Air Force Academy (the "Academy") and a third pertaining to a study of resignations by Academy graduates from the United States Air Force.

2. The items of information sought in this action are (i) case summaries of honor hearings maintained in the Academy's Honor Code Reading Files, with personal references or other identifying information deleted, (ii) case summaries of ethics hearings maintained in the Academy's Ethics Code Reading Files, with personal references or other identifying information deleted, and (iii) a complete copy of a study of resignations from the Air Force by Academy graduates performed by the Academy's Alumni Secretary and completed, on information and belief, in May, 1969.

The Plaintiffs

3. Michael T. Rose, a Second Year student at New York University Law School, is an editor of the New York University Law Review, a graduate of the United States Air Force Academy and a First Lieutenant in the United States Air Force.

4. Charles P. Diamond, a Second Year student at New York University Law School, is Editor-in-Chief of the New York University Law Review, and has occupied that position since March, 1972. He brings this action not in his individual capacity but on behalf of the New York University Law Review.

5. Lawrence B. Pedowitz, a Third Year student at New York University Law School, was the Editor-in-Chief of the New York University Law Review from March, 1971 to March, 1972. He brings this action not in his individual capacity but on behalf of the New York University Law Review.

* * * *

6. Michael T. Rose, other members of the New York University Law Review, and other students at New York University Law School are contributing to the Law Review's study of disciplinary systems and procedures at the service academies. The information sought in this action is germane to that research, the results of which the Law Review intends to publish.

The Defendants

7. Defendant Robert C. Seamens, Jr., sued herein in his official capacity, is the Secretary of the Air Force, having his official office in Washington, D.C. Pursuant to 10 U.S.C. § 8012 (1970), defendant Seamens is

vested with the responsibility for, and the authority necessary to conduct, all affairs of the Department of the Air Force.

8. Defendant Lieutenant General Albert P. Clark, USAF, is the Superintendent of the United States Air Force Academy. Pursuant to 10 U.S.C. § 9334 (1970), defendant Clark is the commanding officer of the Academy, and is vested with general supervisory responsibility for Academy affairs.

9. Defendant Brigadier General Walter T. Galligan, USAF, is Commandant of Cadets, United States Air Force Academy.

10. Defendant Major Charles E. Hart, USAF, a member of the staff of the Academy, has, on information and belief, supervisory authority over its Honor and Ethics Committee.

* * * *

11. Jurisdiction is conferred on this Court by 5 U.S.C. § 552(a)(3).

12. The venue of this action is based upon 5 U.S.C. § 552(a)(3) and lies within this District by virtue of plaintiffs' residence herein.

13. Pursuant to applicable Department of the Air Force Rules and the Freedom of Information Act of 1966, plaintiff Rose requested copies of Honor Code case files in September, 1971, copies of Ethics Code case files in December, 1971 and a copy of the Academy's study of graduate resignations in October, 1971.

14. The study of graduate resignations was requested after receipt by plaintiff Rose of a letter dated September 29, 1969 from Captain Frederick L. Metcalf, USAF, the Academy Alumni Secretary, informing plaintiff Rose that the study would be made available to him on request. (A copy of that letter is annexed hereto as Exhibit "A".)

15. By letter dated October 15, 1971, defendant Charles E. Hart denied plaintiff Rose's request for access to the Academy's honor case files. (A copy of that letter is annexed hereto as Exhibit "B".)

16. By letter dated January 6, 1972, defendant Galligan denied plaintiff Rose's request for access to the

Academy's ethics case files. (A copy of that letter is annexed hereto as Exhibit "C".)

17. By letter dated October 29, 1971, Captain Frederick L. Metcalf, USAF denied plaintiff Rose's request for a complete copy of the Academy's study of graduate resignations. Captain Metcalf forwarded copies of the study with statistical and other information deleted. (A copy of that letter is annexed hereto as Exhibit "D".)

18. On November 29, 1971 Plaintiffs Pedowitz and Rose appealed to the Department of the Air Force the denial of the honor case files and the complete study of Academy graduate resignations. (A copy of the letter appealing the decision to deny these two items of information is annexed hereto as Exhibit "E".) On or about January 15, 1972, plaintiff Rose appealed to the Department of the Air Force the denial of the ethics case files.

19. By letter dated February 14, 1972 Thomas W. Nelson, Administrative Assistant to the Secretary of the Air Force, notified plaintiffs Rose and Pedowitz that their appeal had been denied. (A copy of that letter is annexed hereto as Exhibit "F".) The grounds stated for the denial were that the summaries of honor and ethics hearings were exempt from disclosure under Air Force Regulation 12-30, 4f and 4g(1)(6) and 5 U.S.C. § 552(b)(6) and that the study of Academy graduate resignations was exempt under Air Force Regulation 12-30, 4e and 5 U.S.C. § 552(b)(5), (6).

20. Plaintiffs have exhausted administrative remedies by which they could have obtained the information referred to in paragraph 2 and sought in this action.

21. The public information section of the Administrative Procedure Act, 5 U.S.C. § 552(a)(3), provides that in any legal action brought pursuant thereto "the burden is on the agency to sustain its action" in refusing disclosure. The statute also provides that such proceedings "take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

22. Plaintiffs have a right, pursuant to 5 U.S.C. § 552(a)(3), to inspect and copy the information referred to in paragrah 2, and defendants are improperly withholding the information sought in this action contrary to the terms, intent and policy of the Freedom of Information Act of 1966 and the First Amendment to the United States Constitution. Defendants' withholding the information sought herein has jeopardized the integrity of plaintiffs' proposed research article and has effectively abridged its publication.

WHEREFORE, plaintiffs demand judgment:

(i) enjoining defendants from withholding the information referred to in paragraph 2;

(ii) ordering defendants to make promptly available to plaintiffs for inspection and copying all of said information;

(iii) directing that this cause receive the expedited treatment contemplated by statute; and

(iv) for such other and further relief as this Court deems just and proper.

Dated: New York, New York
April 18, 1972

/s/ Philip L. Graham, Jr.
PHILIP L. GRAHAM, JR.
BARRINGTON D. PARKER, JR.
48 Wall Street
New York, New York 10005
HA 2-8100

JOHN H. F. SHATTUCK
AMERICAL CIVIL LIBERTIES FOUNDATION
156 Fifth Avenue
New York, New York 10010
675-5990

Attorneys for Plaintiffs

MELVIN L. WULF
SANFORD J. ROSEN
AMERICAN CIVIL LIBERTIES FOUNDATION
156 Fifth Avenue
New York, New York 10010

Of Counsel

EXHIBIT A

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE ACADEMY
USAF Academy, Colorado 80840

[SEAL]

29 Sep 1969

REPLY TO

ATTN OF: CSAG (472-2067)

SUBJECT: Graduate Resignations

TO: All Graduates

1. In this first official Alumni newsletter for 1969, I want to inform you of the current status of graduate resignations and of why graduates are departing the Air Force. You will note in the enclosed letter that the Superintendent is very much concerned about graduate resignations. In my official position as Alumni Secretary, I have been deeply involved in the search for answers that would explain why graduates feel that they can no longer satisfy their career aspirations in the Air Force, and, therefore, submit their resignation papers. In December, 1968, I sent a detailed questionnaire to all graduates who, at that time, had an established date of separation from the Air Force. The results were published in May, 1969. The results of a follow-on study initiated in July, 1969 will be available in early October, 1969. In the subsequent paragraphs, I will discuss only the results of the survey completed in May.

2. Generally, graduates feel that the personal frustrations experienced in the Air Force present a stronger motivation for resignation than do the perceived benefits of civilian life. In other words, graduates feel that they are being "forced out" of the Air Force by disagreeable policies, programs, conditions, etc., rather than being attracted out by improved job opportunities, better family life, etc., of civilian life. The factors influencing graduates to resign are listed in their order of significance in Table 1 below.

No voice in future assignments
No sense of accomplishment
Lack of integrity in the Air Force
Transient life in the military
Extensive TDY
No graduate school opportunity within reasonable period of time
Lack of quality leadership in the Air Force*
Personality not suited for military life
Promotion system
No challenge to junior officers
Alert duty
Low pay

TABLE 1

3. The most significant factor influencing a graduate's decision to resign is *no voice in future assignments.* Captain George H. Hines reached the same conclusion in his 1966-67 survey. Many graduates feel utterly trapped in their career progression. They can see no way, after several attempts, in which to extricate themselves from an undesirable assignment; or, they cannot obtain a more desirable assignment that is in line with their career goals; or, they do not understand the rationale behind inconsistent personnel policies that result in assignments they neither asked for on volunteer statements or on career preference statements nor would expect given past personnel policy. The very disturbing factor of *a lack of integrity in the Air Force* is the third most significant, ranking ahead of such commonly accepted factors as *extensive TDY* and the *transient life of the military.* Generally, those graduates who indicated *lack of integrity* to be the most significant factor could not recon-

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* Factor which graduates wrote-in under an "other" category listed in the questionnaire.

cile their concept of integrity as embraced and practiced for their four years at the Academy with the pragmatic acceptance and toleration of degrees of dishonesty that they have found in the Air Force. Several graduates mentioned the "accusations" by their immediate commanders that they were too idealistic with regard to personal integrity.

4. The most significant feature of civilian life that attracts graduates out of the Air Force, or which a graduate could think of as being most attractive, was that of a *more rewarding and satisfying job*. This factor ties in closely with the top two factors influencing graduates to leave the Air Force. The features of civilian life which graduates considered to be most attractive are shown in Table 2 below in their order of significance.

More rewarding and satisfying work
More stable family life
Freedom from day-to-day restrictions of military life
Higher pay
More rapid advancement on the job
Better chance of entering desired career field*

TABLE 2

The second most attractive feature of civilian life, *a more stable family life*, allies closely with two factors of *transient life in the military* and *extensive TDY*, which rank as the number 4 and 5 factors, respectively, influencing graduates to leave the Air Force. The majority of graduates at all ratings—non-rated, pilot, and navigator—showed the factor of *more rewarding and satisfying work* as being the most attractive aspect of civilian life.

5. The above discussion is only a short summary of the study that was published in May, 1969. If you wish a

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* Factor which graduates wrote-in under an "other" category listed in the questionnaire.

copy of the complete survey, merely drop us a line and we'll send one along. If you have any personal comments on the subject of graduate resignations, I would be very pleased to receive them. I would be particularly interested in your thoughts concerning actions Hq USAF can initiate that would directly address the major irritants of a career in the Air Force.

/s/ Frederick L. Metcalf
FREDERICK L. METCALF, Capt, USAF
Alumni Secretary

1 Atch
Status of USAFA Graduates

USAFA GRADUATE ATTRITION

As of 30 June 1969

Class	Total Losses	Vol. Resign	Med. Sep/Ret	Death	Other Reasons	Pilots FSC-1	Pilots FSC-2	Navigators FSC-1	Navigators FSC-2	Non-Rated	(As of 11 Sep 69) MIA	(As of 11 Sep 69) Captured
1959	59	41	3	9	6	43	1	11	1	3	1	0
1960	76	52	5	9	10	54	3	14	3	2	3	0
1961	82	56	4	11	11	56	1	17	4	4	3	1
1962	96	69	4	17	6	72	3	6	0	15	3	1
1963	105	74	7	20	4	72	2	2	0	29	7	2
1964	44	18	6	17	3	14	3	1	0	26	5	10
1965	34	20	2	8	4	9	1	3	0	21	9	3
1966	8	0	3	3	2	2	1	2	0	3	5	0
1967	10	0	2	6	2	4	0	0	0	6	3	0
1968	1	0	0	1	0	0	0	0	0	1	0	0
Total	515	330	36	101	48	326	15	56	8	110	39	17

EXHIBIT B

DEPARTMENT OF THE AIR FORCE

THE AIR FORCE CADET WING
USAF Academy, Colorado 80840

[SEAL]

15 October 1971

Lieutenant Michael T. Rose
Box 4J
33 Washington Square West
New York, NY 10011

Dear Lieutenant Rose

I regret that Academy policy requires denial of public access to honor case files, including the selected ones in the Honor Code Reading File. All of these cases are documented as "For Official Use Only" and are disseminated for internal use only to the Honor Representatives and those few staff personnel who have a continuing need to understand the workings of the Cadet Honor Code. It would be in poor faith with all cadets who have met honor hearings to allow their cases to come into the public eye. To permit the use of honor cases for such purpose would tend to set a precedent that may operate to the detriment of innocent persons.

To be accused or found guilty of an honor violation is an emotionally trying experience that should, in due respect for the rights of the individual concerned, be as limited as possible. Society in general does not understand the difference in the lying, cheating and stealing that constitutes a Cadet Honor violation as opposed to the degree of criminality required in society at large to cause an equally serious type of censor. The problems of such misunderstanding and the unnecessary embarrassment that could result seems to exceed the value to be gained from making the case files available to the public.

I hope that you will understand the reasons for the Academy's policy and that some method will occur to you to permit continuation of your research without the aid of specific Air Force Academy Honor Cases.

Sincerely

/s/ Charles E. Hart
CHARLES E. HART, Major, USAF
Executive, Honor and Ethics

EXHIBIT C

DEPARTMENT OF THE AIR FORCE

THE AIR FORCE CADET WING
USAF Academy, Colorado 80840

[SEAL]

6 January 1972

1st Lt Michael T. Rose, USAF
Box 4J
33 Washington Square West
New York, NY 10011

Dear Lt Rose

The Air Force Academy will be unable to provide you sample ethics cases. The sample ethics cases used in the Honor Code Reading File are designated "For Official Use Only". It is intended that these cases will be used for the edification of the Cadet Wing and Academy staff only. Indiscriminate release of this information to persons without a need to know could be counter to the best interests of the individuals concerned and the Air Force Academy.

Sincerely

/s/ W. T. Galligan
WALTER T. GALLIGAN, Brig General, USAF
Commandant of Cadets

EXHIBIT D

ASSOCIATION OF GRADUATES

UNITED STATES AIR FORCE ACADEMY
Colorado 80840 303 472-2067

[SEAL]

29 October 1971

Lt Michael T Rose
Box 4J
33 Washington Square West
New York NY 10011

Dear Mike:

As you requested in your letter of 4 October I am forwarding to you copies of the two 1969 resignation studies. Due primarily to guidance from the Superintendent I have had to delete from the report the statistical part and the part containing the quoted graduate comments. I hope that the abbreviated form of the report will still be of use to you.

With regard to your question about studies on why cadets leave the Academy, I would suggest that you write to the Director of Cadet Personnel and Administration (CWP).

Sincerely,

/s/ Frederick L. Metcalf
FREDERICK L. METCALF
Capt, USAF
Executive Secretary

2 Atch
As Stated

EXHIBIT E

29 November 1971

Secretary of the Air Force
Hq. USAF (AFJAL)
Washington, D.C. 20330

Dear Sir:

A member of the *New York University Law Review* is writing a law Note on "The Disciplinary Systems of Service Academies." In researching the Note that individual has requested, on behalf of the *Review*, two items of information from the Air Force Academy, which have been denied. This letter is a request that those denials be reconsidered.

1. The *Review* has asked for a copy of all case summaries of Air Force Academy honor hearings. The attached Honor Operating Instructions #4 and #5 indicate that all "guilty" case summaries and representative "not guilty" and "discretion" summaries are contained in an "Honor Code Reading File" located in forty different offices at the Academy. Our letter requesting a copy of those summaries indicated that the *Review* wished to use them solely to research and support certain ideas in the Note and that we did not wish to use, or even to know, the identities of any of the parties involved in the honor cases. Our request also pointed out that the present Executive of the cadet Honor and Ethics Committees told us that some cadets who have left the Academy for honor violations have indicated on a form, filled out while processing out of the Academy, that the Air Force had their permission to release the details of their honor cases to educational institutions for educational purposes; that the *Review's* research requirements may be satisfied by releasing only those case summaries in which the cadets involved indicated that they could be released; and that the Air Force would seemingly be able to avoid any problems of violating the trust of cadets if only those case summaries were released to it.

When denying our request the Air Force Academy must not have been aware of the following provisions of 5 U.S.C. § 552(a)(2), which provides in relevant part:

> (2) Each agency . . . shall make available for public inspection and copying—(a) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases. . . .
> . . . .
>
> To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion. . . .

Had the Academy been aware of the above provisions, we feel certain that it would not have felt that denial was appropriate.

We wish to emphasize that we are not interested in knowing the identity of any cadets involved in honor hearings. We wish to use the cases merely to document the various meanings the Air Force cadet Honor Committees have attached to the terms "lying, cheating, stealing and tolerating." Contrary to the view expressed by the Air Force Academy's letter of denial, cadets would hardly feel that the Academy had shown "poor faith" by releasing the requested information if they realized (1) that the only case summaries released were those for which the cadets involved had given their specific prior approval for the releases and (2) that appropriate "identifying denials" had been deleted, as permitted in the above cited statute. If the releases already in the possession of the Academy are insufficient to negate the privileged information problem, we ask for the opportunity to produce written releases from some of the former cadets who were involved in the summarized honor cases.

Also, contrary to the views expressed in the Air Force Academy's denial of our request, we believe the public could understand the workings of the cadet honor code if they were privy to the requisite information. The judgment as to whether and how the academies' honor codes will work is implicitly vested in Congress by Article I, Section 8, cl. 14 of the Constitution, as is the case with all other military disciplinary systems. The public must have knowledge about how the codes function in order to properly advise its elected representatives how to structure that aspect of the academies' disciplinary systems. It seems elementary that the public's view of military justice would be enhanced if it perceived that the military was willing to examine the efficacy of its disciplinary system *on its merits* rather than attempting to avoid that responsibility by keeping information about its disciplinary systems from the public.

2. A letter from the Air Force Academy's Association of Graduates, dated 29 September 1969, discussed a study "published" in May 1969, about "the current status of graduate resignations and . . . why graduates are departing the Air Force." That letter, which was addressed to "All Graduates," stated at page three that "the above discussion is only a short summary of the study that was published in May, 1969. If you wish a copy of the complete survey, merely drop us a line and we'll send one along."

First Lieutenant Michael T. Rose, an Air Force Academy graduate and a member of the *NYU Law Review*, wrote to the Association of Graduates and asked for "a copy of the complete survey." As shown in the attached copy of the Academy's reply, Lieutenant Rose was denied certain portions of the study. This letter constitutes an appeal to that denial.

It seems that a "published" study, all of which is sent to "All Graduates" upon request, cannot be included in any of the exceptions stated in 5 U.S.C. § 552(b) and therefore must be made "promptly available to any person." 5 U.S.C. § 552(a)(3). In any case, Lieutenant Rose, as an Academy graduate, is certainly entitled to the study along with other Academy graduates. To deny him the complete study discriminates against him as an individual and, in view of his stated purpose of using the information for researching the *Review's* Note on the academies' disciplinary systems, indicates an unwilling-

ness by the Academy to permit citizens to know how *their* military operates.

For the above reasons the *Law Review* and Lieutenant Rose appeal the Air Force Academy's denials of their requests for the above items of information. We regret that it is necessary to trouble you with these matters. We realize that those who denied the requests probably did so only because they were unaware of the requirements of the Freedom of Information Act. In the event that our appeals are denied, however, we will feel compelled to continue to pursue this further.

Sincerely,

Michael T. Rose
1st Lt., USAF
Staff Member
NYU Law Review

Lawrence B. Pedowitz
Editor-in-Chief
NYU Law Review

EXHIBIT F

DEPARTMENT OF THE AIR FORCE
Washington 20330

Office of the Secretary [SEAL]

14 Feb. 1972

Gentlemen:

Your appeals of November 29, 1971 and January 13, 1972 of the denials by the United States Air Force Academy concerning the case summaries of honor hearings, the complete study of resignations of Academy graduates, and sample ethics cases have been thoroughly reviewed and given careful consideration. For the reasons set forth below, your appeals are denied.

The summaries of the honor hearings and the sample ethics cases are exempt from disclosure as they fall within the purview of 5 U.S.C. 552, para (b)(6) and AFR 12-30, paras 4f and 4g(1)(b). The complete study of the resignations of graduates of the Academy is exempt under the provisions of AFR 12-30, para 4e and 5 U.S.C. 552, paras (b)(5) and (6). A release of the honor hearing cases and ethics cases would constitute an unwarranted invasion into the privacy of former cadets of the Academy. Some cases may be recognized by the reader by the circumstances alone without the identity of the cadet given. This being the case then the reader could easily connect the incident with the particular cadet involved. Additionally, they are internal documents which are not meant for mass circulation. They are stamped "For Official Use Only" and are afforded subscribed routing and handling procedures.

The study of graduate resignations is also exempt from disclosure. It has been drafted by the Air Force Academy in the office of the Alumni Secretary who is assigned to the Academy under military orders. This study constitutes an internal document containing opinions, recommendations, and suggestions of Academy graduates. A

copy of the analysis has been forwarded to you and is the only part of the document which may be properly released. The study was prepared in part from responses of Academy graduates who presented frank answers to definite questions with the implied understanding that these answers were not to be made public, but were to be used in a study to improve various phases of cadet training as well as career development. Publication of material from the study would seriously hamper further studies and definitely curtail frank responses to questions which often are quite critical to the development of better methods of retaining Academy graduates as career officers in the Air Force.

This decision constitutes final Air Force action on your request.

Sincerely,

/s/ Thomas W. Nelson
THOMAS W. NELSON
Administrative Assistant

Lieutenant Michael T. Rose, USAF
and
Mr. Lawrence B. Pedowitz
New York University Law Review
249 Sullivan Street
New York, N.Y. 10012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

—against—

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

ANSWER

Defendants, Department of the Air Force, Robert C. Seamens Jr., Lieutenant General Albert P. Clark, USAF, General Walter T. Galligan, USAF and Major Charles E. Hart, USAF, by their attorney, Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, for their answer to the numbered paragraphs of the complaint herein, upon information and belief allege, as follows:

1. Neither admit nor deny in that these allegations purport to state conclusions of law.
2. Neither admit nor deny and respectfully refer the Court to the complaint for a statement of plaintiffs' allegations.
3. Deny for lack of knowledge or information sufficient to form a belief except admit that Michael T. Rose is a graduate of the United States Air Force Academy and a First Lieutenant in the United States Air Force.

4-6. Deny for lack of knowledge or information sufficient to form a belief.

7. Deny as conclusions of law except admit that Robert C. Seamens, Jr. is the Secretary of the Air Force and has his official office in Washington, D.C.

8. Deny as conclusions of law except admit that Lt. General Albert P. Clark is the Superintendent of the United States Air Force Academy.

9. Admit.

10. Deny except admit that Major Charles E. Hart is a member of the staff of the United States Air Force Academy.

11. Deny.

12. Deny for lack of knowledge or information sufficient to form a belief.

13. Deny except admit that plaintiff Rose made the request referred to in paragraph 13 of the complaint and respectfully refer the Court to 5 U.S.C. 552, and the Department of the Air Force Rules referred to in paragraph 10 of the complaint.

14. Deny except admit that plaintiff Rose has made a request for the study of graduate resignations and that Captain Frederick L. Metcalf is the Air Force Academy Alumni Secretary and transmitted a letter, a copy of which is attached to the complaint as Exhibit A. Respectfully refer the Court to Exhibit A of the complaint for the contents thereof, and aver that this letter was not a personal letter to plaintiff Rose.

15. Admit and respectfully refer the Court to Exhibit B to the complaint for the contents thereof.

16. Admit and respectfully refer the Court to Exhibit C to the complaint for the contents thereof.

17. Deny except admit that by letter dated October 29, 1971, Captain Frederick L. Metcalf transmitted the letter attached to the complaint as Exhibit D and forwarded copies of material requested by plaintiff with necessary deletions and respectfully refer the Court to Exhibit D to the complaint for the contents thereof.

18. Deny except admit that the Air Force received the letter dated November 29, 1971 attached to the complaint as Exhibit E and that on or about January 15,

1972, plaintiff Rose appealed to the Department of the Air Force the denial of the ethics case files and aver that plaintiff Pedowitz did not make initial request for the documents which were the subject matter of the November 29, 1971 letter attached to the complaint as Exhibit E.

19. Deny except admit that the letter attached to the complaint as Exhibit F was sent by Thomas W. Nelson, Administrative Assistant to the Secretary of the Air Force to plaintiffs Rose and Pedowitz and is dated February 14, 1972, and respectfully refer the Court to the letter attached to the complaint as Exhibit F for the contents thereof.

20. Deny except admit that plaintiff Rose has exhausted his administrative remedies.

21. Deny as conclusions of law.

22. Deny.

FIRST AFFIRMATIVE DEFENSE

The Court lacks jurisdiction over the subject matter of the action.

SECOND AFFIRMATIVE DEFENSE

None of the plaintiffs except Michael T. Rose has exhausted his administrative remedies.

THIRD AFFIRMATIVE DEFENSE

None of the defendants except the Department of the Air Force is a proper party to the action.

FOURTH AFFIRMATIVE DEFENSE

The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray that the action be dismissed with prejudice and that they be granted their costs.

Dated: New York, New York
June 30, 1972

WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the
Southern District of New York
Attorney for the Defendants

By: /s/ T. Gorman Reilly
T. GORMAN REILLY
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Telephone No.: (212) 264-6317

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

v.

DEPARTMENT OF THE AIR FORCE, etc., *et al.*, DEFENDANTS

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM R. BRONNER, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and as such I have been assigned the defense of the present action. I am fully familiar with the facts therein involved.

2. I submit this affidavit in support of the Government's motion for summary judgment for all defendants and dismissal of plaintiffs' complaint on the general ground that it fails to state a claim as to which relief may be granted.

3. This action seeks an order directing the defendant Air Force and its responsible officials, including the individual defendants, to make available to plaintiffs for their inspection and copying, case summaries of honor hearings and of ethics hearings, and the statistics contained in and an appendix to a study of United States Air Force Academy ("Academy") graduates' resignations from the Air Force ("the Resignation Study").

4. Two of the three documents sought relate directly to the Cadet Honor Code, a rule of conduct which states succinctly, "We will not lie, steal or cheat nor tolerate among us anyone who does." The Code was adopted by the first Cadet class at the Academy from the Honor Codes in use at the other service academies and some civilian universities. The Cadet Wing (the undergraduate body) administers the Code and instructs its membership in its ramifications. In case of violations (a unanimous vote of 8-0 is required to find a man guilty) the Cadet Honor Committee can ask the violator to resign from the Academy, or it can grant "discretion" (by a subsequent vote of 6-2 or more) to return to the Wing in good standing. If a man elects, after advice of counsel, not to resign he may face a Board of Officers or a Court Martial.

5. The Ethics Program involves enforcement of ethical strictures generally considered of lesser magnitude than the questions of honor involved in the Honor Code. The Program, although less structured, operates generally along lines analogous to the Honor Code. The Honor and Ethics case summaries sought in this action are collections of what are in the nature of "briefs" of significant cases and are maintained "for official use only" by the Academy. See the Regulations on Appointment to and Disenrollment from the Academy, AF Reg. 53-10, 53-3; the Honor Reference Handbook of the Air Force Cadet Wing; Air Force Cadet Wing Manual; Cadet and Ethics Manual; Honor Operating Instructions; and Honor Review Committee Regulations (Exhibits 1-7).) The Honor System in use at the Academy, since it punishes toleratators of offenses equally with the offenders, has always been controversial. However, it should be emphasized that the value of this approach is not the issue in the present action; the issue is the right to access to these documents, not the validity of the ideas reflected therein.

6. The third document sought is a study of the reasons given by Academy graduates for leaving the Air Force. Plaintiff Rose is already in possession of the analytic portion of the study. He now seeks a statistical portion and an appendix containing certain personal com-

ments made in confidence to the Academy Alumni Secretary.

7. Plaintiff Rose is a First Lieutenant in the Air Force and a 1969 graduate of the Academy, and consequently possesses the knowledge gained from four years' experience of daily life under the Honor Code. In addition, plaintiff Rose possesses or at least is familiar with the contents of the various regulations referred to above (*See* Exhibits 1-7; *see also* Disclosure of Air Force Records, A.F. Reg. 12-30, 32 C.F.R. 886, (Exhibit 8).) Furthermore, he has obtained large amounts of information by corresponding with and visiting Academy professors, administrative officers and Cadets (*See* Metcalf, Hart, Lee, Kinevan and Wallace affidavits, and correspondence exhibited therewith *see also* Ragen letter dated February 3, 1972. (Exhibit 9).) He has also corresponded with other service academies. (*See* Prugh letter dated December 14, 1971, (Exhibit 10)).

8. Nevertheless, the present action was commenced to acquire the three documents which the Air Force in accordance with its policy declined to produce for public dissemination (*See* Exhibit 8, *supra*; *see also* Wickers affidavit). Plaintiffs allege that these documents will assist plaintiff Rose in his preparation of a publishable Note for the New York University Law Review, on the subject of disciplinary systems and procedures in the service academies. It is not contended by plaintiffs that the documents now sought are essential to the proposed Note; the Note has apparently been drafted in at least preliminary form since earlier this year (*See* Rose Letter dated January 24, 1972, (Exhibit 11)). Rather, plaintiffs argue that this lawsuit is justified by the value of the documents as potential footnotes to the Note. The amount of dislocation to be suffered from non-disclosure of these documents is, therefore, minimal.

9. It is not disputed that plaintiff Rose has unsuccessfully attempted to obtain through administrative channels what he now seeks judicial assistance in obtaining. Plaintiff's right to the material is of course strenuously contested, for the reasons stated in the accompanying memorandum of law. It should also be noted, how-

ever, that the Air Force officers with whom plaintiff dealt responded to his numerous and sometimes vexatious requests for assistance with good-faith and good-natured cooperation, within their authority to do so. The Lee, Hart, Kinevan and Metcalf affidavits and correspondence amply document information relevant to his study which Lieutenant Rose received from affiants. For instance, Col. Kinevan, by later dated August 30, 1971, reassured plaintiff, who is still an officer in the Air Force, that the Air Force would not oppose his writing on his proposed subject and that doing so would in no way jeopardize his Air Force career. Col. Kinevan also offered Rose his own editorial experience on the California Law Review in analysis of potential difficulties of focus and scope of the Note. (See Kinevan affidavit and correspondence, exhibited therewith). Other qualified instructors gave similar assistance. Thus defendants' opposition to the attempt to obtain public disclosure of the documents sought by plaintiff does not reflect their reluctance to permit scholarly analysis or public consideration of the merits of the Honor Code or any other aspect of Air Force Life. Rather, their opposition is based upon their expectation that disclosure of the contents of these documents would violate assurances of confidentiality previously given, and would seriously embarrass present and former Cadets by disclosure of extremely personal information. These assurance of confidentiality should be respected.

WHEREFORE, defendants respectfully submit that inasmuch as plaintiffs have failed to state a claim upon which relief can be granted, the complaint should be dismissed upon its merits.

/s/ William R. Bonner
WILLIAM R. BONNER
Assistant United States
Attorney

Sworn to before me this
25 day of September, 1972.

/s/ [Illegible]

INDEX TO EXHIBITS AND ATTACHMENTS

Page

Exhibit:

1. Regulations on appointment to the academy. .....
2. Regulations on disenrollment. .....
3. Regulations on appointment and disenrollment (Superceded). .....
4. Honor Reference Handbook. .....
5. Cadet Wing Manual (Ethics Manual). .....
6. Honor operating instructions. .....
7. Honor review committee regulations. .....
8. Regulations on disclosure of records. .....
9. Ragen letter dated February 3, 1972. .....
10. Prugh letter dated December 14, 1971 .....
11. Rose letter dated January 24, 1972 .....

LETTER ATTACHMENTS

Affidavit	
Kinevan	Rose dated August 21, 1971 (3 pages). .....
	Kinevan dated August 30, 1971. .....
	Rose dated September 23, 1971. .....
Metcalf	Rose dated August 21, 1971 (1 page). .....
	Rose dated September 5, 1971. .....
	Metcalf dated September 28, 1971. .....
	Rose dated October 4, 1971. .....
	Metcalf dated October 29, 1971. .....
	Rose dated November 18, 1971. .....

c. The Class Committees. The class committees for the first, second, third, and fourth classes are subcommittees of the Academy Board. The appropriate class committee evaluates cadets whose academic achievement is questionable and makes recommendations to the Academy Board pertinent to the disposition of cadets found deficient in studies.

d. Board of Officers Appointed Under AFR 11-1. These board will hear cases and make recommendations as prescribed herein.

SECTION B—RESIGNATION

9. Policy on Accepting Resignations. The right of a cadet to resign from the Air Force Academy is subject to certain restrictions. 10 U.S.C. 9348 requires each entering cadet who is a citizen or national of the United States to sign an agreement that he will complete the course of instruction at the Academy. The acceptance of a resignation is a discretionary executive act. A resignation from the Academy may entail a period of active military service.

10. Resignation. Each resignation will contain a complete statement of the reasons for which submitted and, when appropriate, have attached documentary evidence to substantiate the reasons given. The Academy Superintendent will forward, with his recommendation, the resignation submitted under this section to the Secretary of the Air Force.

a. If a cadet has had prior service, the Superintendent will normally recommend to the Secretary of the Air Force that a fourth or third classman be discharged or transferred to the cadet's prior military component.

b. If a cadet resigns voluntarily after he commences the second class academic year (third year) and before the beginning of his first class academic year (fourth year), the Superintendent will normally recommend that he be called to active duty for 2 years.

c. If a cadet resigns voluntarily after the beginning of his first class academic year, the Superintendent will normally recommend that he be called to active duty for 3 years.

11. Resignation Tendered by Cadet. A cadet may tender a resignation for any reason listed below unless he is officially notified that action to separate him under sections C, D, or E has been initiated. If his resignation is accepted, he will be discharged honorably or transferred to the Air Force Reserve in an appropriate grade and ordered to active duty under paragraph 10. The Superintendent's Resignation Review Committee will evaluate each resignation tendered under this section.

a. Academics.
b. Environmental Adjustment.
c. Change of Career Goals.
d. Personal Reasons.
e. Marriage.

f. Breach of Cadet Honor Code—when the cadet has been notified officially that he may resign voluntarily under this paragraph.

g. Hardship. The current provisions for evaluating airman hardship cases will be generally followed (documentation requirements, etc.).

(1) If the substantiated conditions are such that the cadet's temporary assistance will eliminate the problem, he will be considered for administrative turnback to a subsequent class.

(2) If the conditions are permanent, the cadet will be considered for separation or discharge as appropriate.

(3) If separation/discharge is considered appropriate, the Superintendent will forward the case, with documents substantiating the hardship to the Secretary of the Air Force with his recommendation.

12. Resignation Instead of Action Under Section E. A cadet who receives official notification that action has been initiated under section E may tender his resignation under this paragraph with the understanding that, if accepted, he will be discharged under honorable conditions or transferred unless the Secretary of the Air Force directs that the cadet be honorably discharged or trans-

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the investigation discloses evidence indicating the cadet is disqualified for continued cadet status, he will forward the case to the Superintendent recommending referral to a board of officers.

21. Notice to Cadet of Board Action. If the Superintendent determines that referral of the case to a board of officers convened pursuant to AFR 11-1 is appropriate, the cadet will be furnished notification prepared as shown in attachment 1.

a. If the cadet does not waive a board, the case will be referred to a board of officers composed of not less than three nor more than five commissioned Air Force officer members, at least one of whom will be serving in the grade of colonel. A field grade judge advocate will be appointed as a legal advisor to the board (without vote), and a commissioned officer will be appointed as a recorder (without vote). The board will make findings of fact which will be sent to the Academy Board for its review and determination of whether the cadet remains qualified as a candidate for graduation from the Academy. If the Academy Board recommends disenrollment from the Cadet Wing, the case will be returned to the board of officers to hear evidence bearing on the character of discharge or separation and make recommendations thereon. The cadet will be afforded an opportunity to appear before the board with counsel and present such statements or evidence as he may desire. Thereafter, the Superintendent will forward the record, together with his recommendations on the type of discharge, to the Secretary of the Air Force.

b. If the cadet waives a hearing before a board of officers on the facts, the case will be presented to the Academy Board for its determination as provided in a *above*. The cadet may submit a written statement to the Academy Board for its consideration even though he has waived a hearing by a board of officers. If the Academy Board recommends disenrollment, the case will be referred to a board of officers to hear evidence bearing on the character of discharge as in a *above*.

22. When Board Action Is Considered Appropriate. Action under paragraph 21 is appropriate if substantial evidence indicates that any of the circumstances in this paragraph or similar circumstances exist:

a. Conduct incompatible with exemplary standards of personal conduct, character, and integrity. This is evidenced by the existence of one or more of the following or similar circumstances:

(1) Advocacy of political or ethical beliefs which would preclude fulfillment of the commissioning oath.
(2) Breach of the Cadet Honor Code.
(3) Repeated and dishonorable failure to meet financial obligations.
(4) Use or possession of narcotics or dangerous drugs; or excessive or illegal use of alcoholic beverages.
(5) Willful failure to meet minimum standards of academic or military proficiency.
(6) Repeated failure to meet required formations or other military duties, either willfully or through gross indifference.
(7) Loss, destruction, or waste of Government property under circumstances indicating a gross disregard for public property.
(8) Repeated commission of minor offenses not warranting trial by court-martial.
(9) Indecent and lewd acts and acts of sexual perversion including transvestism.

b. Conviction by a civil court of any offense for which confinement for more than one year is an authorized punishment in the table of maximum punishments in the MCM. 1969 (Revised Edition).

c. Information received indicates that the retention of a cadet may not be consistent with the interests of national security. The facts and circumstances will be reported to the local office of special investigation (OSI) and an investigation by that office will be requested. On receipt of the report of in-

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Attachment C

TABLE 1

POLICY AFFECTING CADET DISENROLLMENT

RULE	A if the cadet is a	B and his disenrollment is for	C and he came from	D then, he will be	E and receive	F and his separation/ discharge will be	G Under authority of AFR 53-3
1	C4C or C3C	voluntary resignation	civilian life	discharged	256AF	honorable	paragraph 11.
2			military component	separated	assignment back to that component		
3		deficiency (involuntary separation)	civilian life	discharged	256AF		Paragraph 14, paragraph 24.
4		deficiency (involuntary separation) academics	military component	separated	Assignment back to that component		paragraph 18.
5		aptitude		discharged	256AF (note 1)		paragraph 17.
6		conduct			256AF (normally) (note 1)		paragraph 16.
7		medical		separated or discharged	assignment back to component or 256AF		paragraph 24.
8	C2C or C1C	voluntary resignation	civilian life	separated	call to active duty for minimum of 2 years (notes 2 and 3)		paragraph 11.
9		voluntary resignation	military component			honorable	
10		deficiency (involuntary separation)	civilian life				

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11		academics			assignment to AFRes if deficiency is nonwillful (note 1)		paragraph 18.
12					Call to active duty if deficiency is considered willful (notes 1 and 3)		
13		aptitude		discharged or separated	discharge if deficiency is nonwillful (note 1)		paragraph 17.
14					call to active duty for a minimum of 2 years if deficiency is considered willful (note 3)		
15		conduct			(same as 11 and 12)	honorable (normally)	paragraph 16.
16		medical		separated or discharged	(as directed by SecAF or 256AF)	honorable	paragraph 24.
17		deficiency (involuntary separation)	military component				
		academics		separated	(Same as 11 and 12)	honorable	paragraph 18.
18		aptitude		discharged or separated	(Same as 13 and 14)		paragraph 17.
19		conduct			(Same as 15)	honorable (normally)	paragraph 16.
20		medical		separated or discharged	assignment back to component or 256AF	honorable	paragraph 24.
21	C4C, C3C, C2C, C1C	Good of the service (instead of trial by court-martial)	N/A	discharged or separated	(as directed by SecAF)		paragraph 19.

Attachment 6

NOTES: 1. The Board/Committee evaluating the individual case will determine whether the cadet's deficiency demonstrates willful or nonwillful action and whether he is unsuitable or unfit for military service.

2. Cadets from C2C may be awarded grade E-3; cadets from C1C may be awarded grade E-4.

3. The Superintendent will normally recommend to the Secretary of the Air Force that a first class cadet disenrolled voluntarily or for actions considered willful be ordered to active duty for 3 years.

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charge.

(2) DD Form 257 AF: General Discharge (Under Honorable Conditions).

(3) DD Form 791 AF: Under Other Than Honorable Conditions Discharge.

c. A cadet disenrolled for any of the following reasons normally is honorably separated or discharged. He may tender his resignation for one of the reasons listed in (1) through (12):

(1) Career goals.
(2) Personal reasons.
(3) Hardship.
(4) Marriage.
(5) Fear of Flying.
(6) Environmental adjustment.
(7) Academics.
(8) Admitted or court-adjudicated paternity claims.
(9) Physical disability, service incurred with no willful misconduct involved or existing prior to entering service.
(10) Deficiency in academics.
(11) Deficiency in conduct.
(12) Deficiency in aptitude for commissioned service.

d. A cadet disenrolled under one of the following sets of conditions normally is awarded a general discharge certificate "under honorable conditions" or a discharge certificate "under other than honorable conditions."

(1) A cadet discharged for physical disability incurred through his intentional misconduct or willful neglect, or incurred during a period of unauthorized absence, is discharged "under honorable conditions." A cadet who tenders his resignation for this reason does so with the understanding that, if accepted, he will be discharged "under honorable conditions."

(2) A cadet discharged for possessing undesirable habits or traits of character of such a nature as to preclude an honorable discharge is discharged "under honorable conditions" (general discharge certificate DD Form 257 AF) or "under other than honorable conditions"

(DD Form 794 AF), depending on the seriousness of the offense. Chronic alcoholism, drug addiction, sexual perversion, habitual shirking, repeated commission of minor offenses not warranting trial by court-martial, and financial irresponsibility, are examples of acts or conduct exhibiting undesirable habits or traits of character. A cadet who tenders his resignation for any of these reasons tenders his resignation for the good of the service with the understanding that, if accepted, he may be discharged "under other than honorable conditions."

(3) A cadet who commits a major offense triable by court-martial—such as murder or man-slaughter—normally is brought to trial unless special circumstances exist which would warrant consideration by a board of officers convened under AFR 11-1 to consider the cadet for administrative discharge. A cadet who is administratively discharged under these conditions is discharged "under other than honorable conditions." A cadet who commits an offense as outlined above may tender a resignation for the good of the service, regardless of whether or not formal court-martial charges have been preferred. A cadet who tenders such a resignation does so with the understanding that, if accepted, he may be discharged "under other than honorable conditions."

(4) A cadet who has been tried by court-martial for an offense or offenses for which maximum punishment authorized by MCM, 1951, includes a punitive-type separation, but, upon conviction, is sentenced to less than dismissal may be administratively discharged "under other than honorable conditions," notwithstanding trial by court-martial.

(5) A cadet who has been convicted by a civil court of any offense involving moral turpitude may be administratively discharged "under other than honorable conditions."

(6) If information is received which indicates that the retention of a cadet may not be consistent with the interests of national security, report the facts and circumstances to the local office of special investigation (OSI) and request an investigation by that office. On

receipt of the report of investigation, take action as outlined in AFR 35-62.

21. Special Provisions for Breaches of Cadet Honor Code:

a. A cadet who breaches the cadet honor code may be tried by court-martial when in the opinion of the Superintendent such action is necessary in the interest of good order and discipline. Court-martial proceedings are instituted only when there is reasonable assurance that the evidence at hand will result in conviction. A cadet in this category may tender a resignation for the good of the service, regardless of the fact that formal court-martial charges have or have not been preferred. A cadet who tenders such a resignation does so with the understanding that if accepted he may be discharged "under other than honorable conditions."

b. A cadet who commits a breach of the cadet honor code which would warrant trial by court-martial, but, because of the facts of the case, court-martial action is not deemed appropriate, normally is administratively discharged "under other than honorable conditions." A cadet in this category may tender a resignation with the understanding that if accepted he may be discharged "under other than honorable conditions."

c. A cadet who commits a breach of the cadet honor code which would not warrant trial by court-martial, but which is not considered to be a minor violation, normally is administratively discharged under honorable conditions. He may tender a resignation with the understanding that if accepted he may be discharged "under honorable conditions."

d. A cadet who commits an offense which is considered to be a less serious breach of the cadet honor code than those referred to in *a*, *b*, or *c* above, is honorably separated/discharged. He may tender a resignation with the understanding that if accepted he will be "honorably separated/discharged."

e. When a cadet is being processed for separation under *a*, *b*, or *c* above, attach to the forwarding correspondence a statement indicating the type of offense committed and other pertinent facts. These statements

are used at secretarial level in determining the character of separation to be awarded, and are not made a part of the cadet's official records.

SECTION C—REPORTING REQUIREMENTS

22. Service Academy Disenrollments. RCS: DD-M(A) 851. Submit an annual report indicating the following information for each class in attendance during the preceding academic year to HQ USAF (AFPTRA) not later than 15 August of each year.

a. Number discharged for unsuitability, unfitness, or physical disqualification. ..... _____

b. Number discharged for all other reasons. ..... _____

c. Number transferred to the Reserve component and ordered to active duty ..... _____

d. Number transferred to the Reserve component and not ordered to active duty ..... _____

e. Number separated and reverted to former Reserve or Regular status, except those included in *c* above ..... _____

f. Total number separated during the year ..... _____

23. Monthly Report. USAFA submits a monthly report on USAF Academy Cadet Attrition to HQ USAF (AFPDPRR) not later than the 7th day of each month. Annotate report to reflect cadets dropped from class strength but not assigned strength who are later returned to a class. Identify cadets returned to class rolls as to the class year in which they will graduate.

24. Individual Report of Separation. Report separation of a cadet before graduation to the congressional sponsor on AF Form 631, "Report of Separation from USAF Academy." USAF (CRR) completes the form (used only by HQ USAF and the Air Force Academy) and forwards it to HQ USAF (AFPTRAB) for notification to the appropriate congressman.

SECTION D—AIR FORCE ACADEMY PREPARATORY SCHOOL

25. How To Apply for Preparatory School:

a. AFR 53-14/BUPERS INST 1530.49/MCO 1530.5A tells in detail how to apply for the Air Force Academy Preparatory School course, when the course is to be conducted, and how students are selected.

b. Any eligible member of the Air Force on extended active duty or assigned to a Reserve component may apply for preparatory school in conjunction with an application for the Air Force Academy.

[SEAL]

HONOR REFERENCE HANDBOOK OF THE AIR FORCE CADET WING

20 June 1970

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THIS MANUAL SUPERSEDES ALL PREVIOUS EDITIONS OF THE HONOR MANUAL

THE CADET HONOR CODE

"We will not lie, steal, or cheat, nor tolerate among us anyone who does."

This is your Honor Code—a code that means many things to you as a cadet and future officer. It means the pride of knowing your word is trusted implicitly. It means the respect you have for the property of others and the consideration you expect others to have for your property. It means the responsibility to accept credit only for your personal achievement. It means the moral courage to protect the Wing from any cadet who places his standards below those of the Wing's Honor Code. The Code embodies the attitude of every cadet who has jealously guarded its existence since it was first established by the Class of 1959.

You will find that living by the Honor Code is not so difficult as living without it. It is not a unique set of standards. It is based on the ideals every American encounters from childhood. They are not limited to the Cadet Wing. They are certainly the foundation of character for every officer who desires to be considered honest and trustworthy. The Cadet Wing expects each cadet to make the Cadet Honor Code a part of his personal code throughout his life.

The Code's Philosophy

Former Secretary of War, Newton Baker, said, ". . . the inexact or untruthful soldier trifles with the lives of his fellow men and with the honor of his government . . ." The young officer needs to be able to trust his men as does any commander. In these times of expensive and increasingly complex weapons systems, the officer must rely on fellow officers and airmen for his own safety and the safety of his men. By living honorably while a cadet, it is hoped that such conduct will become second nature and follow the individual throughout his career. The Honor Code then is another important aspect of the training that a cadet gets at the Academy; however, in this case the Cadet Wing has set its own standard.

Origin of the Code

The Honor Code was originated by the first class to enter the Academy. They studied the honor codes and systems in use by institutions throughout the country, including the United States Military and Naval Academies, Virginia Military Institute, and others. These were screened, formulated, and organized into a system and basic code which was presented to the Cadet Wing in 1955 by the first Commandant of Cadets. It was accepted by the Class of '59 and subsequently administered, interpreted, and cultivated by them and their successors. The Honor Code has always belonged to the Cadet Wing which administers and instructs the Code through its Honor Committee with the advice and counsel of the Commandant of Cadets. It is the duty of the Cadet Wing to insure that the Code never becomes stagnant or unrealistic. Honor is not only the responsibility of the squadron Honor Representative and the Honor Committee. Every cadet must feel responsible for the vitality and effectiveness of the Code. Suggestions, problems, or questions should be communicated to the squadron Honor Representative.

Legal Basis for the Honor Code

The legal basis, particularly for the punitive aspects of the Cadet Honor Code, is the Uniform Code of Military Justice. In general, all four aspects of the Cadet Honor Code (lying, cheating, stealing, or tolerating any of those acts), are punishable under military law. Specific articles of the UCMJ which could apply vary with the circumstances, but include Articles 80, 92, 107, 121, 122, 123, 133, and 134. Executive orders, service regulations and orders issued at lower levels of command as well as established customs and usages of military service are recognized and violations are made punishable by the UCMJ. Article 134, for example, includes all disorders and neglects to the prejudice of good order or discipline and of a nature to bring discredit upon the armed forces, even though such misconduct is not specifically enumerated in the Uniform Code. The entire

body of accepted military custom and tradition has established high standards of responsibility and conduct for officers and cadets. Both the written laws (UCMJ), and the unwritten customs and usages of the military service, provide strong support for punitive action against such acts as are prohibited by the Cadet Honor Code.

Mission

The final mission of the Code is to influence cadets to live honorably so that they will graduate as officers with the highest standards of individual honor and integrity.

The Cadet Honor Code is regarded as the minimum standard of conduct. The Code is realistic and reasonable. Each cadet should realize that the standards that are expected of him are a minimum and that he should maintain a set of personal values higher and broader than those established by the Honor Code. The Honor Code should be analogous to a foundation upon which the cadet seeks to build his own integrity—always seeking to improve what has been done before. These standards of conduct apply anytime, anyplace, and in any situation. By making the Code all-encompassing, cadets have established a true standard that is more than a mere formality to be observed occasionally. Honorable conduct must be a continuous pattern of behavior.

Honor Violations

The purpose of the Cadet Honor Code is to build within the man a keen sense of honor and an intense dedication to live by the dictates of this sense of honor. The man who fails in this is deemed unworthy of cadet status and is asked to resign from the Academy. There are two elements in an honor violation, the act and the intent. In the following pages the prohibited acts of lying, stealing, cheating and toleration are defined. These acts, or an attempt to accomplish these acts, must be performed if a man is to be found guilty of an honor violation.

The question of intent poses greater difficulty to define and prove. To some extent the intent required depends

upon the act involved. There are some acts which are inherently wrong. In these cases the intent to commit the act is sufficient to justify a guilty vote. For example, a man who takes a crib sheet into a class and uses it to cheat does not have to think specifically "this is wrong and it is against the Honor Code." His intent to commit the act would be enough. There are other acts which are defined as wrong. For a man to be found guilty of these violations he must know they are wrong and think about the wrongful nature of the act at the time. For example, a man who goes on an unauthorized absence with his card marked must know that his card is marked and be aware of the meaning of a card marked "authorized," in order to have violated the Code.

What is expected by the Cadet Wing is that the cadet will act as a reasonable and honorable man and make judgments which a reasonable and honorable man would make.

LYING

Lying is making an assertion which is intended to deceive or mislead. A lie may be an oral or written statement, or even an action, which is misleading or deceiving and meant to be so. That's all there is to it. It is a simple concept. The following pages merely expand on the first two sentences of this paragraph, covering situations which may be peculiar to the Cadet Wing due to the atmosphere of trust we live in; they clarify situations which may not be unique to the Academy, yet are new to you; and they will answer some of your questions before you ask them.

Keep in mind that the points mentioned in the following pages are inseparable. They all cover lying; only the form is different. Each one can be thought of in terms of the basic definition of lying. You should try to relate everything back to the basic concept as you read. In this way, you will get a feeling for the "spirit" of the Honor Code. It is this spirit of the Code which you will someday carry away from the Academy as a part of you.

Quibbling

A person can easily create a false impression in the mind of his listener by cleverly wording what he says, omitting relevant facts, or telling a partial truth. When he knowingly does so with the intent to deceive or mislead, he is quibbling. Quibbling and lying are not separable; they are one and the same thing.

Reports

Every cadet at one time or another must render a report of some sort, and it is important for each cadet to realize the meaning of the report. Oral or written reports must be complete and accurate because the report is a statement made by the cadet. When reports are given in ranks, the person rendering the report must give the name or number of cadets who are absent and whose status (authorized or not) is not known for certain. The Dormitory Inspector's report ascertains that he has made the inspections which he lists on the CCQ report; and that he has inspected all cadet rooms and reported all cadets who were absent from their rooms with their cards unmarked.

Other reports such as the CCQ report and the Cadet Accountability System reports must be accurate before they are signed. In general, cadets should know what they are saying when an oral or written report is made or before they apply their signature or initials to a report or document.

The Lost Articles Inspection

The lost articles inspection is made for the purpose of recovering articles lost by cadets. It is mentioned here only because it is unique to the Academy; it is a convenience which is possible because of the Honor Code. A list of lost articles, along with the date of the lost articles inspection, will appear in the Daily Bulletin. Cadets should check before the inspection to see if they have any of the lost articles. For example, if one of the lost articles is a class shirt, cadets should check the

nametags of all their class shirts. When a cadet gives an "all right," he is saying that he has already checked his possessions for the lost articles and found that the missing items were not among them. He cannot give the "all right" until he has performed the check or knows beyond any doubt that he does not have the item in question.

Pop-offs and Mistakes

It is easy to inadvertently make a false statement. Once a cadet realizes his mistake, however, he should attempt to correct it with the person to whom the statement was made at the first reasonable opportunity. If the person is unknown or unavailable, he should tell his Honor Representative the circumstances of the incident. If he lets the mistake ride, he is allowing the false statement to stand as the truth, which is then no different from making a false statement initially with the intent to deceive or mislead.

The kind of mistake described above is termed a "pop-off." It is usually a yes or no answer, or a short statement, made in haste and without thinking. It is not an honor violation if it is corrected.

Tact

Social situations may arise in which a cadet should not embarrass another person by being completely truthful. Here is an obvious example: The hostess asks her cadet guest if he enjoyed the meal she spent two hours preparing. It would go against all the rules of etiquette for the cadet to reply, quite truthfully, "As a matter of fact, I was just going to ask for a glass of water—the chicken was so dry it was all I could do to get it down." The cadet may apply tact to save someone else's feelings and that is not considered a lie. Of course, the best solution would be to comment on some part of the meal that the cadet actually did like.

A cadet should apply tact only in a social situation when common sense dictates it to avoid embarrassing

someone else and never with personal gain in mind. If there is ever any doubt as to whether tact applies, go ahead and be completely truthful.

Signatures

A cadet's signature is his word. As a cadet, there will be many times when your signature—whether it is your full written name, typed name, initials, check mark, or whatever—will be required to affirm that you have performed some task, to certify that a document is complete and accurate to the best of your knowledge, or to indicate some other response. If you are required to do something before you place your signature, keep in mind that when you sign, you are in effect saying, "Yes, I have done what is required." A violation of your signature is a lie.

Privileges

The Commandant grants privileges to cadets on the basis of rank, performance, and other criteria. Cadets can take privileges they earn without wading through cumbersome administrative controls only because a cadet's word or signature can be trusted. While this atmosphere of trust is something to be proud of, it is also something to be guarded, and not abused. A cadet must fulfill certain requirements before taking a privilege:

First, a cadet must be authorized the privilege; a cadet is authorized to take only a certain number of privileges during a specified period. Additionally, a privilege cannot be taken in conflict with military duties or punishments. Second, a cadet must receive proper permission to take the privilege.

Some privileges, such as the ones that a cadet does not sign out for, e.g., the recreation privilege in Arnold Hall, may not require specific permission. On the other hand, some privileges, like the Weekend Pass and the Visiting Permit, have additional requirements. The Weekend Pass requires that the cadet fill out the proper form and have it signed by his AOC. The Visiting Permit requires that

the cadet be with his host at all times except while going straight to or from the host's residence.

Only a few examples of specific requirements have been given. A cadet should be completely familiar with the privilege regulation, because when he signs out on a particular privilege or permit or when he marks his status card to take a privilege, he is saying that (1) he is authorized to take the privilege, (2) he has received permission to take it, and (3) he will take the privilege he is signing out for, as defined in cadet regulations.

I.D. Cards

Besides being a severe offense under the Uniform Code of Military Justice, the intentional misuse or falsification of an identification card is a form of lying. The cadet who presents an I.D. Card for any purpose is implying that the card is his and that it is correct. If it is not, he is lying, because he knows that the person to whom he has presented the card has accepted it as being his and being correct.

For example, if a cadet is 20, yet his I.D. Card says he is 21, and he uses his I.D. to purchase liquor, he is lying. Once again, the simple test is to ask yourself, "Will my statement or action mislead or deceive the person to whom it is directed?" If so, it is a lie.

The Status Card

When a cadet marks his card by putting it in the "authorized" position, the card is speaking for the cadet during Evening Call-to-Quarters. When the card is marked, it says that the cadet is in cadet limits, as defined in AFCR 35-9. If a cadet unintentionally violates his card, he should see his Honor Representative immediately so that appropriate action can be taken to correct this situation. Of course, an intentional violation of the card is lying.

Cadet regulations spell out when, in addition to Evening Call-to-Quarters, the card should be marked. The important thing to remember with regard to honor is that your marked card speaks for you just as if you were standing in front of your room saying you were in an authorized place.

Improper or Unnecessary Questions

The goal of the Honor Code is to establish within each cadet a keen appreciation for the importance of integrity in the character of the professional military officer and to insure each cadet's dedication is being a man of honor and integrity. Within this framework the Honor Code is a tool for self-discipline and is not a regulatory device imposed by the Academy Administration. A cadet's sense of duty should dictate that he properly discharge his responsibilities, even though he is not honor-bound to do so. However, the Honor Code does dictate that the cadet will not lie or quibble to avoid responsibility for his mistakes or shortcomings. Cadets are expected to be straighforward in answering the questions of superiors and to stand up to whatever punishment they bring upon themselves. This expectation is patterned after that which will be expected of the graduate once he is commissioned an officer in the United States Air Force.

Caution is necessary when questioning cadets to insure that the Honor Code is not used unfairly. Good judgment and a sense of fair play is a continuous obligation on the part of the questioning officer or cadet. Obviously, a cadet should not be asked an embarrassing personal question about his private life. Generally, the prudent degree of questioning is related to whether the questioning individual has reasonable suspicion that the questioned cadet has knowledge of, or was implicated in, some act or incident. Questions should be avoided when there is only vague suspicion that some punishable act did occur.

For example, the Air Officer Commanding who finds an empty liquor bottle in the latrine would not line his squadron up and ask each cadet if the bottle were his. On the other hand, if the bottle were found in a cadet

room both occupants could properly be questioned about the incident.

While the purpose of the Honor Code is not to enforce regulations each cadet must realize that throughout life he will be asked to certify by his signature that he has or has not done certain acts. For example, a man may be required to state his marital status, the state of his health, or whether he has ever been a member of a subversive organization. To falsely answer such questions is a violation of public law, the Uniform Code of Military Justice, Air Force regulations, and a man's personal honor as well as of the Cadet Honor Code. The Honor Code should not be used unfairly against a cadet but neither should it be a shield behind which the cadet hides to avoid accepting the responsibility for his actions.

If a cadet feels that the Honor Code has been used unfairly against him he should answer the question and then discuss the situation with his honor representative. If it is deemed appropriate the case will be discussed with the Executive for Honor and Ethics who will take the necessary corrective action.

STEALING

Stealing is defined by the Cadet Wing as intentionally depriving someone else of his property without his permission. This act may be either a permanent or temporary deprivation. If something is not yours, you cannot take it without permission from the owner.

Borrowing

Borrowing must be considered in conjunction with stealing. A cadet must have either specific or implied permission to borrow another person's belongings. One should not take advantage of close friendships by being careless in borrowing. The borrower should leave a note giving his name and the item borrowed. He should also return borrowed items promptly.

Destruction of Property

Obviously, to destroy another's property is the same as depriving the owner of its use. Wilful destruction of another's property is a violation of the Honor Code by stealing. If a cadet accidentally damages, destroys or loses someone's property, it is his responsibility to repair or replace the item involved.

Government Property

Cadets should not feel that their presence in the military entitles them to assume ownership of government-owned materials. Government property should always be treated in the same manner as personal property.

CHEATING

Over your four years at the Academy, you will be in constant competition with other cadets. In fact, competition is one of the most important aspects of a cadet's life. The results of this competition will greatly affect your future career here at the Academy and in the Air Force. It is expected, therefore, that each cadet will compete fairly with his fellow cadets. Cheating is fradulently acting out of self-interest to take unfair advantage of others. Cheating is not confined to any single area—it applies to your whole life as a cadet. The cadet who falsifies his score on the physical fitness test or who copies on a squadron training test has been as dishonest as a cadet who copies another's work in an academic course. Since the academic environment at the Academy is probably different from your previous experience, the next few sections will discuss the various academic peculiarities of the Academy.

Graded Work

In general, any work done for a grade must be done without another cadet's help unless such help is specifically authorized by the instructor. The work is accepted by the instructor with the idea that you have done it by

yourself. Of course, different academic departments will have certain policies which allow outside help or teamwork on certain assignments. Such policies will be explained by your instructors at the appropriate time. It is essential that you understand these policies; if you have any questions, be sure to ask your instructor to clear them up.

Quizzes and Graded Reviews

A cadet must never copy another cadet's work or compare answers with the intent of confirming or checking an answer during a graded recitation. At the Academy, the same test may be given to all sections of a course on the same day. It is clear that a cadet would be placed at a definite advantage if he had early knowledge of the contents of an exam. The only thing you may tell another cadet is the fact that an exam has been given. Avoid phrases of the type, "Boy, I had a tough quiz today." This type of small talk can lead to more specific things about an exam and may put one of your classmates in a difficult position. Do not discuss an exam with any cadet who may later take the same test. If a cadet does find out *any* of the contents of an exam, he should tell his instructor. Usually, the instructor will give him another question or another exam.

Because of their faith in the honesty of cadets, instructors will often leave the room at the beginning of an exam and return after the exam is over. It is therefore the cadet's responsibility to know and observe starting and stopping times of the quiz. Usually the section marcher will give "Cease Work" or a similar command. At that command stop working *immediately*. If you notice that time is up, it is your responsibility to give "Cease Work." Only the instructor can give you permission to finish an answer or sentence.

Some courses will give take-home examinations. It is your obligation to know the restrictions on such exams (i.e., working time, materials which can be used, etc.).

The restrictions will usually be printed on the cover sheet of the quiz, or the instructor will discuss them.

Plagiarism

In writing essays or themes, it will often be necessary to use the ideas and words of others. Plagiarism is the use of such ideas in an attempt to pass them off as your own. Plagiarism can be avoided by properly documenting outside sources. The English Department makes available to each cadet an English handbook explaining the writing and documenting of themes. If any doubt exists about documenting, a cadet should check with his instructor.

No attempt should be made to cover up sloppy or incomplete research work by stuffing bibliographies or giving fictitious sources and page numbers. Such an act implies intent to receive credit for work the cadet has not done.

Use of Library

Our library policies are designed for maximum convenience for cadets; such freedom is possible because of the Honor Code and the trust vested in us. Therefore it is important that everyone conscientiously abide by library policies and directives. The concept of taking unfair advantage of your classmates may arise in this area. For example, many courses require certain reading to be completed from books on reserve in the library. To deny another person the use of one of these books, or any book, by hiding it in another part of the library or by taking the book without checking it out would have honor implications and could be considered cheating or stealing.

TOLERATION

The backbone of the Honor Code is the toleration clause which requires that every cadet report any suspected violation of the Code. If a cadet suspects another cadet of violating the Honor Code, he should first approach the individual and inquire about the circumstances surround-

ing the situation. A misunderstanding or mistake may be easily and quickly cleared up in this manner; however, if the suspecting cadet is not absolutely certain in his own mind that the incident was not an honor violation, he should tell the individual involved to see an Honor Representative and later check to insure that this was done. If the incident is of a serious nature, it is sometimes better to contact an Honor Representative first and allow him to make an investigation. In cases where a possible breach of the Honor Code is not completely resolved, an Honor Representative should be contacted. Toleration cannot be present until the intent to ignore the honor violation is formulated. In some cases, several hours or even days of serious thinking may be necessary before the decision is finally made to turn in or not turn in the suspected honor violator. During this period the cadet is encouraged to talk with someone whom he respects, for example, an honor representative, a chaplain, or some other officer. Toleration can only occur when the conclusion is made not to turn in the suspected cadet.

It is important that each cadet fully understands the spirit behind the toleration clause, as well as the obligations it creates and the method of reporting a suspected honor violation. Once confronted with the pressures of a toleration situation, it may be too late to formulate a clear decision on it because emotion will be involved. If one has doubts or questions about this clause, the matter should be discussed with the squadron Honor Representative.

The Honor Code belongs to the Cadet Wing, and it is our standard. We have set the pace, and because of this we must remove violators from the Wing if the Code is to mean anything at all. An editorial in the "Denver Post" stated the idea by saying:

> "The success of the Honor Code is realized through its tacit acceptance by all those entering the Academy. It implies that the cadet who cheats has denied himself the membership of this group of highly favored young men. Thus, it is an intrinsic yardstick of moral behavior, clearly recognized as such by everyone who puts on the uniform of an Air Force Cadet."

The following are several different comments on the "no toleration" concept. These should reinforce the logic of the clause.

1. Excerpts from a letter by a member of the Class of 1968.

Written to the Class of 1968 after resigning from the Academy because of violating the Honor Code. Dated: 8 March 1967.

"Do you remember when you accepted the Honor Code? Or like myself do you remember accepting a double standard? Yours and the Academy's.

"What I really would like to say is that we've . . . reached a turning point in our infant careers. I didn't realize this however 'till it was too late to keep from smashing my career.

"To an officer, *Duty* and *Loyalty* should be the two guiding principles of his life—not just inflated words in his vocabulary.

"When I cheated, I broke all bonds of loyalty between ourselves and could no longer claim a loyalty higher than a false one to myself. But you almost erred too—by tolerating my selfishness. Could you have been loyal to yourselves if you had maintained a loyalty to someone who wrongfully discredited you? No. So you could not have tolerated my cheating in your midst. What kind of friend would ask another to cover for his dishonesty?

"In other words, was it not your duty to report me? You would have failed yourself and your true friends.

"Why didn't I understand some of this 'till now? And I'm no different than many of you—except that possibly I'm weaker.

"This letter only poorly conveys what I think and feel. But think about what I wanted to say and what I have

said for above all it is sincere. It has taken a lot of growing up lately to come to these conclusions and I'll always be sorry I missed the boat somewhere . . ."

2. Excerpt from a paper written by Harry P. Wetzler, Class of 1967.

"Behind any Honor Code there must be one goal of paramount importance—that is the development within each individual who lives under the Code of an unwavering sense of integrity, an unwavering sense for that which is 'right' under the circumstances. These qualities are desirable in any member of society, but they are essential in the soldier and officer. For the military man has a high degree of calling: he is responsible to his country, to his many fellow citizens. He is subject to pressures which are greater than those faced by his civilian counterpart, and the consequences of his acts are generally farther reaching. Thus, the officer must have ingrained within him a sense of honor and integrity which will serve him at all times no matter what the difficulties or personal risk. The citizenry has placed their confidence, and oft-times their lives and futures, in the hands of the miltary defense establishment; any laxity on their part cannot be tolerated."

3. Excerpt from a letter sent to all applying students by the Office of the Dean of Students, Davidson College, North Carolina.

"As you know, Davidson believes in the value of many things which are part of the century-old tradition of the College. You will be a part of a student government centered in a longstanding honor system; this honor system requires not only that you yourself refrain from cheating, stealing, and lying in formal statements, but that you report violations of the honor system which come under your observation."

4. Comments made by Brigadier General Seith, Commandant of Cadets, Spring 1967.

QUESTION: SHOULD THE TOLERATION CLAUSE—AND THE HONOR CODE—BE MADE TO APPLY TO ONLY THE MORE "SERIOUS OFFENSES"? SOME CADETS HAVE SAID: "YES, I WOULD REPORT A 'SERIOUS' OFFENSE, BUT NOT SOME MINOR OFFENSE."

Any moral value, habitually transgressed, tends to lose its significance—both for the violator and the tolerator. "Minor" transgressions, having become tolerable, then become the departing point for new levels of "minor" transgressions, levels that once seemed "major." This is the anatomy of moral degeneration.

This was apparent in the cheating scandal of 1965, wherein cadets first tolerated, then cheated only when helping others (but never received help themselves); from here, even bright students found they might as well accept help, and were soon cheating for their own benefit. First they did it only on rare occasions when they were too busy to study. Next they found it convenient to cheat more often. After a while it was nicer to cheat frequently because it permitted them to live in a more relaxed fashion (no studying). From here it went to actively recruiting others; from here cynicism set in, and the violations became increasingly criminal, e.g., passing exam papers, colluding as a ring, stealing, etc., etc.

Moral degeneration does not compartmentalize itself. Some cadets were conditioned for cheating—or tolerating cheaters—by the guilt of dishonorable acts in other areas. In some cases this involved violations of the card or the "All Right." In others, the process was initiated by cheating and expanded into violating the card, or even to stealing.

QUESTION: MANY OF THE CHEATERS STARTED OFF AS TOLERATORS. IT SEEMED TO THEM THAT THE VERY ACT OF TOLERATION BECAME A TRAP. CADETS FOUND THAT THEY HAD VIOLATED THE HONOR CODE, THEN DECIDED THEY

MIGHT AS WELL GO ON AND BE CHEATERS. IF WE COULD REMOVE TOLERATION FROM THE CODE—OR AT LEAST REDUCE THE PENALTY, WOULD NOT THIS TRAP BE REMOVED?

Yes, the very act of toleration *is* a trap. But if we assume no prohibition against "tolerating" a cheater, then toleration would become an even greater trap.

Even without a "no toleration" clause in the Code, many persons who tolerate cheating by others will eventually become cheaters themselves. Anyone who lives closely with cheaters will find it hard not to become discouraged and disillusioned—more so if they are his respected friends. His friends all do it; they don't work hard, while he studies; they get better grades than he; perhaps he loses privileges or is threatened with academic failure. The probability is that if the honest man cannot bring himself to stop the cheater, sooner or later he will throw up his hands and start cheating himself. Widespread toleration will spawn widespread cheating. The closer the student society, the more insidious this reaction will be.

As a matter of fact, if enough people tolerate cheating by others, does not cheating then become an accepted standard—by definition?

If the very act of tolerating cheating weakens one's own resolve not to cheat, would not that resolve be further weakened by the reduction of any threat of discovery by authorities? Would not cheating become easier, in the absence of a real deterrent as represented by the "no toleration" clause?

Concerning a reduced penalty for toleration, it has been suggested that people would not be "trapped" by tolerating if they knew that the penalty was not so extreme. It may be true, that *some* tolerators, having thought it all out, might be less fearful of coming forward with a confession, were the penalty less severe. But *other* cadets who might be deterred from tolerating

by the severity of the penalty might now take a chance thinking primarily of the severity of the penalty to the cheater himself. After all, if the tolerator did get caught (or become conscience-stricken), the penalty would be an endurable one for him, especially when compared to the penalty for his friend, the cheater. So, it is questionable that a reduced penalty for tolerating would decrease toleration—it would very likely increase it.

QUESTION: HOW DOES THE HONOR CODE—AND THE TOLERATION CLAUSE—RELATE TO THE LAW? TO DUTY?

One of the intellectual traps waylaying college students is perversion of "freedom of choice," of "intellectual freedom," of the "responsibility to question and to probe intellectually." In some circles those great principles have become a rationalization for civil disobedience movements, the Vietnicks, and protest movements.

Some cadets have fallen into this trap by saying in effect: "I will *obey* those rules (regulations) which make sense to me. The others I will not." This transfers to the cadet leader who says: "I will enforce only those rules and regulations in which I believe." This cadet denies his sworn duty and responsibility as a soldier, and reflects a concentration on self to the exclusion of another all important principle: The very foundation of U.S. civilization depends upon acceptance of laws imposed by a majority, even though they may not be understood or liked by large segments of the population.

In the military, each man takes an oath to uphold the laws of his country—and the rightful orders and regulations that stem from those laws. Cadet regulations fit this category. No cadet has any right—morally or legally or otherwise—to decide which regulations are not worthy of being obeyed or enforced. True, he may violate a regulation for many personal reasons, however unworthy, and the punishment will follow if he is caught. *But he may never set any regulation aside on the grounds*

that it is an unworthy regulation. This is subversive insubordination.

Cheating, stealing, and lying are unlawful acts under the UCMJ and contrary to the rules of cadet behavior. Toleration of these acts is *also* unlawful. All citizens are bound by law to stop or report unlawful acts; otherwise they become accessories to these acts. Witnesses to felonies (not misdemeanors) are required by law to report these crimes and to identify the persons who commit them.

The obligation of a cadet to the Cadet Honor Code is bound by the law, yet it goes beyond the law and military regulations. Each cadet *knows* he is committed to uphold the Code, to live by it in its entirety, as it stands *now.* He is committed to his classmates, and to each member of the Cadet Wing—and he is committed to this above his loyalty to friends and individuals. He cannot mentally set aside any part of it—including the toleration clause—without violating his commitment to each member of the Wing. He may question a part of it, or he may advocate change, but to remain in the Wing with any reservation about his personal commitment to comply with the Code is in itself dishonorably and fraudulent.

Concerning toleration, each cadet has committed himself to be the guardian of the Honor Code. Just as a priest has committed himself never to reveal a confidence taken in confession, a cadet has committed himself to confront and reveal a violator of the Code. This has become both a duty under the law and a personal commitment.

QUESTION: HOW CAN A CADET RESOLVE THE APPARENT CONFLICT BETWEEN HIS LOYALTIES TO HIS GOD, TO FRIENDS, TO THE SQUADRON, TO A TEAM, AND TO THE HONOR CODE?

No man can be relieved of the conflict of loyalties—to self, to family, to country, and to a host of other commitments. But he can learn to live with these con-

flicts. Resolution of these conflicting demands is a part of growing up.

A professional military man resolves his conflict by his oath of allegiance. Each cadet swears that he will support the constitution; that he will bear true allegiance to the national government; that he will defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty or loyalty he may owe to any state, county, or country whatsoever; and that he will at all times obey the legal orders of his superior officers, and the rules and articles governing the U.S. Air Force.

We all love our country, and we support the constitution—but we need something more concrete on which to hang our loyalties. Thus we love our Air Force, our Wing, our squadron, and our fellows that make up these units. Our allegiance to country is realized through these subordinate loyalties. We also love our families, friends, teammates outside the Air Force. There need be no real conflict here either—provided that our families, friends, and teammates, or our fellow military men do not ask us to violate our pledged loyalties as professional military men. No true friend will ask this. Successful military men nationwide can attest to this fact.

Concerning religious loyalties, most religions recognize that a man may serve his God and still be loyal to his military oath.

QUESTION: IS THE TOLERATION CLAUSE MERELY AN EXPEDIENT? OR IS IT A MORAL VALUE?

"Expediency" is defined as something opportune, something having self-interest in the narrow sense, something having a short range goal. Some cadets have wondered if the toleration clause has only an expedient value, because it is an opportune means of enforcing Cadet Wing sanction against lying, cheating, and stealing. Some have said that "non-toleration" has no moral value in itself, but is merely a tool to enforce a rule.

A moral value is concerned with a standard of right behavior, something that is sanctioned by or operative on one's conscience or ethical judgment. In another sense it also has to do with freedom from anything petty, mean, or dubious in conduct or character.

One of the most common foundations of moral value lies in the preservation of a civilization or a society. That which preserves our society is moral; that which would undermine or destroy the basic foundations of our society is highly immoral. Thus, many of our laws support basic moral values, or are themselves moral—because they aim to prevent destruction of our society or to protect important concepts upon which our nation was founded. For example:

a. Anything which would undermine or destroy the family unit in our civilization is considered immoral, e.g., adultery, cruelty, desertion, etc., etc.

b. Preservation of military authority and effectiveness, in a sense becomes a moral value to those who have taken the Oath of Allegiance. A military organization requires total loyalty in the sense of preserving its integrity. This type of loyalty is demanded because the military organization is essential to preservation of the nation. One of the very fundamental rules of the military organization is that of total integrity in the military member. Lack of integrity destroys the organization's effectiveness and thus endangers the country. This is why, in a military organization, integrity is a strong moral value. Likewise, any condonement of a lack of integrity is recognized as being destructive of the value of integrity, and, in turn, of the organization.

There is another facet to this problem. Is not a man of honor, who accepts a solemn commitment, morally bound to that commitment? An Air Force cadet commits himself by his Oath of Allegiance to his country—and thus to the Air Force Cadet Wing. And, by the very fact of remaining a cadet, he commits himself to obey the Cadet Honor Code. To remain as a cadet, while failing

to accept this commitment, is, in itself, an act of disloyalty—and perhaps also of immorality.

5. Excerpts from a letter to Congressman Charles E. Bennet from C. Warren Dixon III, Class of '66.

7 February 1965

Hon. Charles E. Bennett
US House of Representatives
Washington, D.C.

Dear Mr. Bennett,

My purpose in writing this letter is twofold; first, as one of your appointees to the U.S. Air Force Academy, to let you know that I was in no way involved in the recent honor investigation, either in taking or using examination papers, or in toleration of that act. As such, I am in the vast majority of cadets who were shocked and very dismayed to find such a thing happening here.

Secondly, I feel that I should say something in defense of our Honor Code, which has come under much criticism and abuse from many quarters of late, Congress included.

Our code is a cadet code in every sense of the word. It was designed by cadets, approved and accepted by the Wing, is administered by cadets (under supervision of an officer), and can be changed by voting of the Wing whenever we feel it necessary.

Our code states, "We will not lie, steal, or cheat, nor tolerate among us anyone who does." Our Honor Manual continues, "There can be no shading, no equivocation, no quibbling among honorable men. Therefore a cadet who violates the Cadet Honor Code indicates his unworthiness to be a member of the Air Force Cadet Wing."

It is the toleration point of our Honor Code which comes under the most criticism. Here people's sense (often quite twisted) of fairness and sympathy clouds their judgment of right and wrong. The American public regards "Squealing" to be wrong, Communistic, and numerous other derogatory things. The American public's

moral standards, to speak quite bluntly, have in some areas degenerated to such a point as to allow rapings and killings to occur in full public eye with no one lifting a finger to stop such heinous acts, and refusing to testify against those who committed these acts. Miss Genovese's case is one of several recently. To be quite honest, the American public's warped sense of what constitutes "squealing" has led us to enforcement of the code of criminals; and it is enforced against the public itself.

Our Honor Code, with this point of toleration, is based upon the precept that, in an organization dedicated to and trusted with the responsibility of defense of the nation, an honorable man does not perform *or tolerate* dishonorable acts within that organization without being dishonorable himself. Regardless of his intent, a person who tolerates dishonorable acts is, in point of fact, not an honorable person. We at the Air Force Academy want honorable cadets—and it matters not whether the person committed the act or tolerated it, toleration is tantamount to condonation, and the person is not honorable. We do not want him among us.

The nation trusts its officers with defense secrets, and with huge weapons of destruction. Officers are in charge of administering large amounts of money daily. In these circumstances, dishonorable acts cannot be tolerated. Would the American public like to find that because someone had misappropriated funds, our aircraft did not have fuel or replacement parts; and because we did not have the parts our interceptors could not fly; but the base commander lied that he had his commitment responsibilities met (to avoid punishment, and to cover up for his best friend, the procurement officer who misappropriated the funds); however, the operations officer, knowing the situation, being friends with two officers and short on cash, reports the situation to an enemy rather than the proper authority, and is paid off handsomely for his efforts—and one fine day, our defense system is penetrated through the hole left by this base and several U.S. cities are destroyed as a result. The

American public may regard this example as a bit farfetched, as it is. But it points up the seriousness of toleration. This is exactly what the toleration point of our Honor Code is about. We are training men here to be able to meet their future responsibilities—not to protect their errant friends. Duty to your country is much higher calling than duty to your friends . . . particularly when the friends are involved in dishonor. Cadets here have a duty to their country—to their Academy—and to themselves. Representative Bennett, we do not want to see our Honor Code destroyed by anyone. It is truly one of the most cherished of our institutions, and we regard it as the foundation of our Academy. Without it we would become a government-sponsored civilian school with military trappings, incapable of fulfilling its mission.

To those who would detract from our Honor Code, who would condemn it as being too exacting, too harsh, or unrealistic, may I refer you to an editorial of the *Denver Post* which recently had this to say: "We believe the honor code is proper for the Air Force Academy, that it is, as one spokesman put it, the very heart of the institution and the reason it succeeds. If it is too harsh a doctrine for the average young man to live under, then the average young man has no reason to apply for appointment."

That is the crux of the matter. We do not strive for average performance here. For the sake of the nation, we cannot afford to.

The men who founded our nation were not "average" men. The men who provide its continuing leadership—military as well as civilian—cannot afford to be "average." Particularly if "average" permits rape and murder on public streets, with good, "average" citizens all around.

I feel that I have said enough for now, and taken up enough of your valuable time. I hope that I have been able to explain a little of what our Honor Code is, as sketchily as I have covered it. If I have left any points unclear or poorly covered, I would be happy to answer

any queries about them that you may have. There are other sources better qualified than I, but I would certainly try my best. Thank you very much for your time and consideration.

C. Warren Dixon III
Class of 1966

6. Excerpt from the White Committee Report to the Secretary and the Chief of Staff of the Air Force.

The Toleration Clause

The prohibition against "toleration" which rounds out the Cadet Honor Code is its most exacting and difficult standard. Since "honor" is not an exclusive value, a very real conflict may develop between personal friendship and a higher loyalty to the Cadet Wing which the toleration clause embodies. Here too, however, the standard which cadets exact of themselves, though far more rigorous, is not without roots in society at large.

The moral courage of the crew member of a military or commercial aircraft who reports that a pilot has been drinking furnishes an example. The assistant who denounces a prosecutor for withholding evidence of a defendant's innocence is another illustration. In each of these instances, and many others, the public would condemn the individual for remaining silent. *This is so because our commitments to society as such impose a higher loyalty than is demanded by those who would imperil it.*

Instances of this kind are reinforced and the ethical requirements are heightened when the individual is placed in a position of public trust. Examples include the officer in an Air Force research and development program charged with millions in public funds, who sees a fellow officer stealing; or an officer in a missile complex who condones a false report on the missiles' state of readiness; or a judge who knows that another judge has accepted a bribe; or a doctor who sees a colleague prescribe an illegal and dangerous drug.

While these examples are extreme, they serve to highlight the fact that a public servant is always confronted by the obligation to put the welfare of the community foremost in his scale of loyalties. The toleration clause, in emphasizing that the Honor Code is a community possession of the Cadet Wing, is calculated to develop more fully this awareness in each cadet.

In ordinary circumstances, each of us as an individual decides when he feels bound to report the misdeed of another. In their special circumstances, the cadets have chosen as a group, through the toleration clause, to set a high standard, but one not out of line for a profession committed to public trust and mutual confidence. A military organization depends for its success upon a deep sense of personal responsibility by each member to the group at large. Each subordinate community in our society—university, profession, social club, or religious order—has this privilege, subject only to the legal restraints common to all. The high calling of the Air Force officer and the demands made by the profession of arms lend support to the choice which the cadets have made.

To suggest that such terms as "squealer" or "informer" are applicable is to indulge a misconception. It suggests that future Air Force officers have no higher duty than loyalty toward their personal friends even at the expense of loyalty to the Air Force or the nation it is dedicated to serve. Such epithets are rightly applied only to those narrow relations between man and man in which larger interests and commitments are not involved.

7. Article by Dean Alfred C. Ingersoll, School of Engineering, University of Southern California.*

Integrity—The Keystone of Professional Conduct

While the dean of a professional school must concern himself with all aspects of the educational program

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* Reproduced by special permission from The USC Engineer, Vol 16, No. 3, March 1965, published by the School of Engineering, University of Southern California.

undergraduate and graduate, most of this concern is fairly remote and delegated through appropriate faculty committees. One area where he dare not sidestep direct responsibility, however, is in the building of a keen sense of personal integrity in every single student of his school.

Why should a dean be so much concerned with the integrity of the students? That is, why should he be any more concerned than the rest of the faculty? Every faculty member is of course concerned with the integrity of his students, but he does not stand to succeed or fail on the measure of professional conduct of his students as directly as does the dean.

Why should this be so? It is simply because each faculty member has his own reputation, based upon his integrity and professional conduct, his engineering work, his teaching and his research and publications. In this case of the dean, however, his reputation, while resting to some extent on all of the foregoing, is still largely the reputation of the school, and the reputation of the school depends on nothing so much as it depends on the professional conduct of its graduates.

In the forward to the Canons of Ethics for Engineers, ad developed by the Engineers' Council for Professional Development, the matter is put succinctly:

> "As the keystone of professional conduct is integrity, the engineer will discharge his duties with fidelity to the public, his employers and clients, and with fairness and impartiality to all."

The rest of the Canons of Ethics, as the reader well knows, goes on to delineate the relations of the professional engineer with the public, clients and employers, and with other engineers.

But let us linger on the concept of integrity. The word comes from the same root as the word, *integer*, and it means primarily a state of wholeness, unmarred from an original pure state. From this is derived the concept of moral soundness or honesty, which is the context in which it is used in the Canons of Ethics.

An irreproachable standard of professional conduct, which I hold to be the unasilable foundation essential for every professional engineer, is hard to imagine in a graduate engineer who has not lived by these same standards while a student in engineering school.

And that is why the dean of an engineering school feels a deep personal interest in building and strengthening integrity in his students. It is no more complicated than that.

Let me hasten to note here that this article is not occasioned by any cheating scandal at USC—thank heaven—or by any special feeling of need on my part for such a sermon to be unleashed on USC engineering students. We are seeing all about us, however, articles and letters on this subject appearing in the public press, following the recent serious scandal at the Air Force Academy.

Twice in a single generation have we seen a major cheating scandal brought to light in one of our military academies. Each instance has called forth the most rigorous investigations of which the military is capable. Why should the professional military establishment be so concerned with a little cheating from time to time?

This concern and the exhaustive investigations are based precisely on the fact that there is no such thing as a "little cheating." We spend a good deal of time in teaching engineering to point out that there are many solutions to a given problem, each one correct in certain lights. Both sides of a controversy involving engineering decisions, for example, reveal that such a case is seldom black or white, and the student is accustomed to thinking in terms of grey areas, depending on whose point of view one has.

In the matter of personal integrity, however, there is simply no middle ground. You either have it and live it every day, or you have nothing. Like a coin, it is good and commands full value, or it is counterfeit and worthless.

In the military profession, each person is part of a team. The lives of all of the other members, as well as the success of the mission as a whole, rest practically independently on the shoulders of each member. This is of course especially applicable to military officers, commissioned with making independent decisions and directing the activities of others, and while it is so evidently true during wartime, it is equally important during peacetime. The 317 generals of the U.S. Air Force, for example, are responsible for the proper and efficient spending of some $49 billion of our national budget, practically one-tenth of our Gross National Product! This amounts to more than $150 million per general, on the average, roughly four times the total annual budget of the University of Southern California . . . and it is our tax money, yours and mine.

How unthinkable it is that any link in that chain, or any part of the chains of command leading up to those generals, have any weak spots on the point of personal integrity! The Air Force and all of the other professional military establishments must therefore exercise every imaginable care to see that this sense of integrity and honor is instilled in all personnel from the moment they first think about a military career, and hopefully from the moment they first learn to think for themselves.

We have only to look at other parts of the world, in the present day as well as throughout history, to see what havoc has been wrought through the decay of personal integrity. The fall of the Roman Empire is but a flaming example from antiquity. The most serious problem facing many of the poorer nations today is the lack of a public integrity and acceptance of an income tax structure.

Much of the argument appearing in the press about the Air Force Academy, and in recent years about West Point, relates to the Honor Code which requires a cadet who observes a breach of the regulations to report the offender, though it may be another cadet he thought to be his best friend. Parents of some of the cadets who

have resigned have been particularly bitter because their sons, while not personally involved, have been caught up in the cheating scandal through this indirect involvement in the Honor Code. As representatives and graduates of the Academies have so often explained, the very existence of an Honor Code must imply tota! involvement, on the part of everyone, cadets, instructors, and administration. The workman who is forging a chain on which his life is going to depend is naturally going to see that his own work is as good as it possibly can be, and he is simply out of his mind if he does not report a weak link that he sees in some other part of the chain.

Now, if all can agree that personal integrity is so essential in the military, is it any less essential in the practice of a profession, such as engineering, where we pledge "to place service before profit, the honor and standing of the profession before personal advantages, and the public welfare above all other considerations." Of course not!

Sometimes we say to a student who is reluctant to report a breach of regulations involving another student, "Think of yourself first, and how much others are interested in you and in your reaching success in your life goals. Your 'friend,' whom you feel bound to protect . . . how much does he care about you, whether you succeed or fail in your life's ambition? Now consider your School . . . how much do we care about whether you succeed or not? We care *everything*, that's how much. Why? Because your success, your reputation, multiplied over and over by how many there are of you, become *our* success and *our* reputation." And one blemish on a reputation can, in the nature of one bad apple in a barrel, outweigh a thousand faultless contributions to that reputation.

I hope I may be forgiven for putting so much emphasis on student integrity as a means of promoting the reputation of the USC School of Engineering. It should go without saying that we all feel a personal commitment

to integrity as the very foundation of any honorable human endeavor quite aside from what it may do to enhance our station in life. And I assume we can all agree that engineering is among the most honorable of human endeavors.

DISCRETION

The ultimate goal of the Honor Code is to build officers with a personal concept of honor and integrity. In light of this goal an honor violator who has reassessed the importance of integrity within himself and has resolved to live by the ideals of the Honor Code may well be an asset to the Cadet Wing and the Air Force. For example, a cadet may never have personally accepted the Code, but rather considered it as sort of regulation over him; then because of a breach of the Code, this cadet may suddenly realize the personal importance of honor and resolve to live honorably. For cases such as this, the Cadet Wing has given the Honor Committee the prerogative to grant discretion to a cadet who has been voted guilty and to allow him to return to the Wing.

There are no rigid criteria for the granting of discretion, but there are four general guidelines which the Honor Representatives generally consider: (1) Is the man a fourth classman? (2) Was the case self-reported? (3) Was there some type of unusual pressure involved in the incident? and (4) most importantly, has the cadet truly learned the personal value of honor and resolved to live honorably in the future. The man who has learned this lifelong lesson of honor can be a great asset to the Wing and the Air Force. His retention is therefore not only justified, it is desired.

The use of discretion is reserved for very special cases. It requires a vote of 6-2 by the Honor Board hearing the case in favor of granting discretion. It is through the highly selective use of this clause that the Wing is able to retain a truly honorable man.

ADMINISTRATION OF THE CADET HONOR CODE

1. Responsibilities

a. Responsibilities of All Cadets

(1) Each cadet is responsible for establishing and maintaining a sense of personal integrity which will serve as a cornerstone for his life of dedication to his country. This sense of personal integrity must be a way of life, a standard of conduct and moral strength which will stand firmly as an inspiration to fellow cadets at the Academy, and to associates in the United States Air Force after graduation.

(2) As a member of the Air Force Cadet Wing, responsible to his comrades and to the organization and service to which he belongs, each cadet is a guardian of the Cadet Honor Code. If the Honor Code were not enforced by the cadets themselves it would degenerate into a standard enforced only by the Academy administration and the true value of the Code would be lost. Therefore, each cadet is expected to take appropriate action whenever he encounters an apparent breach of the Honor Code. The procedures for this action are outlined in paragraph 3.

b. Responsibilities of the Honor Committee. The effective discharge of the duties and responsibilities of the Honor Committee is necessary if the Honor Code is to maintain the respect and support of the Cadet Wing. These duties and responsibilities are:

(1) Conduct an honor orientation and training course for the basic cadets during Basic Cadet Training.

(2) Conduct meetings within their squadrons during the academic year to instruct all cadets in the Honor Code, acquainting them with the activity of the Honor Representatives, and advising cadets on points of honorable conduct.

(3) Assure an appreciation and understanding of the purpose and objective of the Honor Code among

cadets along with the importance of accepting the true "spirit" of the Code in their daily activities.

(4) Guard against practices that are inconsistent with the Honor Code.

(5) Inquire into irregularities of conduct, personal or official, on the part of cadets which may be in violation of the Code. When such irregularities warrant, investigate the facts, and conduct honor hearings when necessary.

(6) Each spring conduct an Honor Code orientation for the cadet candidates enrolled in the Academy Preparatory School.

(7) Conduct Honor Code orientations for officers assigned to the Academy and for Academy Liaison Officers. During the fall of the year each academic department should be briefed by an Honor Representative assigned to the individual departments.

c. Responsibilities of All Officers. By direction of the Superintendent, all officers assigned to the Air Force Academy are charged with the responsibility of assisting in maintenance of the precepts of the Honor Code and will report every breach or apparent breach of the Code using the procedures outlined in paragraph 3.

d. Responsibilities of the Commandant's Executive for Honor and Ethics. The Executive for Honor and Ethics is directly responsible to the Commandant of Cadets for the supervision of the instructional activities, investigations and hearings of the Honor Representatives. His role is advisory in nature and his efforts must be directed toward assisting the Honor Representatives in insuring the vitality of the Cadet Honor Code.

2. Election and Tenure of Honor Representatives. During the month of March the third class in each cadet squadron will elect, by majority vote, an Honor Representative from the third class. The elected representatives will serve until graduation unless he is relieved for cause by the Commandant. Vacancies will be filled by election to insure that each squadron has a first and a second class Honor Representative at all times. Each March the Chairman, Vice Chairman, and

the Secretary of the Honor Committee will be elected from the second class Honor Representatives.

3. Reports of Breaches of the Cadet Honor Code.

a. Cadets

(1) When observing a possible honor violation normally the cadet should confront the suspected cadet and ask for an explanation. This procedure often clarifies whether a violation has in fact been committed, encourages the violator to manfully accept his obligation to report himself, and gives him the opportunity to do so. Sometimes it is more appropriate to report directly to an Honor Representative. The course to be taken is left a matter of judgment for the cadet concerned.

(2) After personally confronting the suspected cadet, a cadet should report the matter to an Honor Representative if the suspected cadet has in fact breached the Honor Code and has not, or apparently will not, report himself.

(3) When an incident requires further investigation it will be referred to the Chairman of the Honor Committee by the Honor Representative. The Chairman will appoint an investigation team as outlined in paragraph 4.

b. Officers

(1) When an AOC discovers an apparent breach of the Cadet Honor Code he will report it to his squadron Honor Representative or to the Executive for Honor and Ethics.

(2) Faculty and Department of Athletics—When an officer assigned to an academic department or to the Department of Athletics discovers an apparent breach of the Cadet Honor Code, he should:

(a) Report the facts of the case to the departmental Honor Liaison Officer.

(b) The departmental Honor Liaison Officer will inform the department head and the assigned Cadet Honor Representative of the suspected breach. The fac-

ulty Honor Liaison Officers will also inform the faculty Honor Liaison Coordinator of the case.

(c) The departmental Cadet Honor Representative will inform the Executive for Honor and Ethics and proceed with the investigation. He will also insure that all concerned parties are informed of the outcome of the investigation as soon as practical.

(3) All other officers who discover apparent breaches of the Cadet Honor Code will report the fact directly to the Executive for Honor and Ethics (COCHE).

4. Conduct of an Honor Investigation.

a. Purpose of an Investigation. The purpose of the investigation is to evaluate the circumstances of a case to determine whether the incident should be considered by an Honor Board. The team, in conjunction with the Chairman of the Honor Representatives, has the authority and responsibility to drop from further consideration any incident wherein it is determined that an honor violation did not occur. If the team believes a hearing by an Honor Board is necessary, they will provide the available evidence and information for the Board's consideration.

b. Investigation Procedures. In the conduct of an investigation, thoroughness is more important than speed but the matter should be completed without unnecessary delay. The Legal Advisor to the Honor Committee should be consulted in each case to assist in investigations.

(1) Before taking any testimony from a witness or accused cadet the investigation team will satisfy the requirements of Article 31, UCMJ. Written statements should be taken from all witnesses as well as from the accused during the investigation.

(2) All persons who may have relevant information will be interviewed by the investigating team. The importance of a thorough and impartial investigation cannot be overemphasized.

(3) If the investigation reveals that there has been no breach of the Cadet Honor Code, the case will be dropped. If such an investigation was originated by a report from an officer, the Executive for Honor will

inform that officer through the same channel by which the incident was first reported. The appropriate investigating cadet will immediately return any evidence or documents which may have been received from an Honor Liaison Officer. Prompt action in possible cheating incidents is especially necessary to prevent unnecessary withholding of a cadet's grade and/or constraint of an instructor.

(4) If the investigation reveals the probability that a breach has been committed, one of the investigators and the Executive for Honor will brief the Commandant, and the case will be referred to the Honor Representatives for a hearing.

5. Conduct of an Honor Hearing. When an honor hearing is determined to be appropriate an Honor Board will be constituted by the Honor Committee Chairman. The Board will consist of eight First Class Honor Representatives selected from squadrons other than that of the accused cadet.

a. At the hearing the accused cadet will again be advised of his rights under Article 31, UCMJ.

b. The accused cadet will be given full opportunity to call witnesses of his choosing and to present testimony in his own behalf.

c. If a witness' account of the incident or situation conflicts with that of the accused, the witness shall present his testimony to the Honor Board in the presence of the accused.

d. After hearing all relevant testimony the accused will be dismissed from the room and the Board will discuss the case. When the discussion is complete the Honor Board will vote by secret ballot. An unanimous vote of 8-0 is required to find a man guilty.

e. Following a guilty vote the Honor Board may, in rare cases, grant "discretion." A "discretion" vote by the Board indicates their conviction that the man has learned a lifelong lesson and that he will thereafter uphold the ethical standards of the Wing. When voting for discretion the Board should consider foremost the best interest of the Cadet Wing and of the United States

Air Force. A positive vote of six of the eight Board members is required to grant "discretion."

f. A cadet found "not guilty" or one granted "discretion" will be returned to the Wing in good standing.

g. A cadet found "guilty" is expected to resign from the Academy. However, prior to submitting his resignation, he will be given legal counsel by a Staff Judge Advocate. That officer explains the rights and privileges available to the cadet. He makes it clear that resignation is not mandatory and that the cadet should not resign unless he is in fact guilty and ready to admit it. If the cadet elects not to resign he may meet a Board of Officers or a Court Martial.

h. If a man elects to resign he will be processed out as soon as possible.

6. Announcement of Proceedings.

a. Appropriate information about not guilty cases or cases resulting in the granting of "discretion" will be given to the Wing. Such information will be general in nature to avoid revealing identities of those involved.

b. Information about cases resulting in a finding of "guilty" will be fully briefed in all squadrons after the cadet involved has departed the Academy. Such cases will be analyzed and discussed in the interest of preventing similar cases, and to keep the Wing informed on the operation and vitality of the Honor Code.

SPIRIT OF HONOR

"We will not lie, steal, or cheat, nor tolerate among us anyone who does."

This is our Honor Code. It is not meant to provide a complete set of ethical standards for life; it is a minimum standard, a cornerstone or foundation upon which each cadet can build toward a much higher ethical and moral plane. The Code itself is realistic if every cadet accepts and upholds the true spirit of our code of honor. It is livable, as is easily seen in the bonds of trust which exist among all cadets. The truly honorable cadet

will not hide behind his Code, nor will he try to live by only these bare minimums. Every cadet must understand and respect the Honor Code and should expect every other cadet to regard the Code highly if it is to remain something to be proud of.

The proper prospective for our Code comes by viewing it as the basis of a solid structure of ethical and moral rules and guidelines. Conduct should not be determined simply by whether an act is specifically an honor violation; if you are in doubt about an act being honorable, ask yourself what the most honorable action would be and then set your own path. The spirit of honor should always be your guide.

THE AIR FORCE CADET WING

Personnel

THE ETHICS MANUAL

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1 MARCH 1965

THE AIR FORCE CADET WING—USAF ACADEMY

NR. 30-2

THE AIR FORCE CADET WING,
USAF ACADEMY COLORADO

1 March 1965

Personnel

THE ETHICS MANUAL

PURPOSE: This manual prescribes policy and procedures for the Cadet Professional Ethics Committee, and defines its functions.

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This manual supersedes AFCWM 30-2, 2 April 1962.
OPR: CWH

CHAPTER I

POLICY AND RESPONSIBILITIES

1. Policy. A Cadet Professional Ethics Committee is authorized and constituted by the Commandant of Cadets to provide guidance in the improvement of ethical standards and practices within The Air Force Cadet Wing.

2. Procedure. As directed in Special Orders, the Cadet Professional Ethics Committee is recognized as an official cadet agency under the direction of the Commandant of Cadets and will function as described herein in the execution of their assigned responsibilities.

3. Responsibility. Each cadet is responsible for establishing and maintaining a sense of personal integrity which will serve as a cornerstone for his life of dedicated service to his country. Each cadet should adhere to the basic principles of the Cadet Honor Code and develop above those standards a sense of personal ethics commensurate with the high standards of personal conduct required by the Air Force Cadet Wing. This sense of Honor, Ethics, and overall personal integrity should be a way of life, a standard of conduct and moral strength which will stand firmly as an inspiration to all United States Air Force officers.

CHAPTER II

THE PROFESSIONAL ETHICS PROGRAM

4. Purpose of this Manual. This manual provides for the establishment of a permanent Cadet Professional Ethics Committee under the Commandant of Cadets which, at the cadet level, will be responsible for the improvement of cadet ethical and moral standards.

5. Purpose of the Cadet Professional Ethics Committee (CPEC). The purpose of the Cadet Professional Ethics Committee (CPEC) is to further the cadet's awareness of a need for the application of professional ethics, and,

by developing ethical courage, improve personal and group ethical standards, foster a strong sense of duty and extend the high ideals of the Honor Code. In doing this, the Committee seeks the development of the individual toward the goal of a Professional Military Man, a man whose personal, moral and social conduct reflects the highest qualities of character and manhood. As a professional military servant of his nation, his life is dedicated to the service of his country and the preservation of its principles. This duty is his honor.

CHAPTER III

CONSTITUTION OF THE CADET PROFESSIONAL ETHICS COMMITTEE

6. Appointment of Members. The CPEC shall be composed of one First Classman and one Second Classman per Cadet Squadron. Second Class members shall be elected annually on 15 September by the Second Classmen of each squadron. The election of these members shall be subject to the approval of the Commandant of Cadets, through the Squadron and Group Air Officers Commanding. Upon such approval, the recommended cadets will attain full status as CPEC members. The remainder of their Second Class year will be used for training and indoctrination into the responsibilities and functions of the Committee. The Chairman and Secretary of the CPEC will be elected annually by the Second Class members of the Committee on or before 1 February. They will assume the duties of the Chairman and Secretary upon the graduation of the preceding class and retain these positions until the graduation of their class.

7. Recommendations for Membership in the Committee. Nominees to the Cadet Professional Ethics Committee must be in good military standing. Members may be removed from the Committee at any time, if in the opinion of the Commandant of Cadets or the majority of the Committee, their performance warrants. Replacement members will be elected in the manner described in paragraph 6.

CHAPTER IV

FUNCTIONS OF THE CADET PROFESSIONAL ETHICS COMMITTEE

8. Primary Responsibilities. The two primary responsibilities of the Cadet Professional Ethics Committee are:

a. To recommend, prepare, and conduct formal and informal instruction in Cadet Professional Ethics under the supervision and guidance of the Commandant of Cadets.

b. To keep the Commandant of Cadets, the AOC Chain of Command and the Cadet Chain of Command informed of the ethical problems in the AFCW and to keep the Commandant of Cadets informed of the progress of ethical training in the Cadet Wing through his designated chain of command.

9. Committee Functions. Routine functions of the Cadet Professional Ethics Committee shall include, but are not limited to, the following responsibilities:

a. Recommend, prepare, and conduct formal Cadet Professional Ethics Instruction for the Cadet Wing.

b. Bring problem areas of an ethical nature to the attention of the Cadet Wing and recommend to the chain of command possible solutions commensurate with the ideals of a Professional Military Man.

★ c. Conduct Ethics Committee Disciplinary Boards in accordance with AFCR 35-6, paragraph 33f.

d. Be responsible for monitoring and assisting in the improvement of the ethical and moral standards of the individual cadets within the squadron. The Squadron Ethics Representative, each committee member, must strive to establish himself as meriting the confidence of those cadets having a personal problem which they do not wish to discuss outside the Cadet Wing and which does not involve the Cadet Honor Code. The Squadron Ethics Representative and the Squadron Honor Representative will coordinate their efforts to insure that

each cadet in their squadron receives the proper type of guidance in matters of Honor and Ethics.

e. Coordinate committee responsibilities by working closely with allied agencies, such as the Honor Committee, Chaplains, and Hostess in areas of overlapping cognizance.

f. The Squadron Professional Ethics Representative may appear as a witness before a disciplinary board at the request of the offender or at his own request.

g. The Chairman of the CEPC or his designated representative will attend Honor Committee hearings and Honor Committee meetings at the request of the Chairman, Cadet Honor Committee.

h. The Chairman of the CPEC or his designated representative may witness the proceedings of the Commandant's Disciplinary Boards for the purpose of collecting information concerning the offender's ethical conduct in committing his offense. This information may be used, when appropriate, in the ethical training of the Cadet Wing.

CHAPTER V

ADMINISTRATIVE PROCEDURE

10. Official Status. The Cadet Professional Ethics Committee shall be recognized as an official cadet agency, under the Commandant of Cadets, for the guidance and improvement of ethical and moral standards within the Air Force Cadet Wing.

★ 11. Officer in Charge. The Executive for Honor and Ethics shall be the Officer in Charge, Cadet Professional Ethics Committee.

★ 12. Officer Advisor. The Officer Advisor, Cadet Professional Ethics Committee, shall be a Squadron Air Officer Commanding so appointed by the Commandant of Cadets. He will have authority to supervise CPEC functions, and will be responsible to the Executive for Honor and Ethics.

★ 13. Command Procedures. The Cadet Professional Ethics Committee shall be responsible to the Commandant of Cadets through CWH, for the formal portion of Ethics Training and for routine functions relating to the ethical status of the Air Force Cadet Wing. The scheduling of formal training will be coordinated with the Wing Training Officer and CWO.

ROBERT W. STRONG, JR.
Brigadier General, USAF
Commandant of Cadets

OFFICIAL:

/s/ James M. Adams
JAMES M. ADAMS
CWO, W4, USAF
Administrative Officer

DEPARTMENT OF THE AIR FORCE
The Air Force Cadet Wing (USAFA)
USAF Academy Colorado 80840

CHANGE 1
AFCWM 30-2
30 April 1971

Personnel

THE ETHICS MANUAL

AFCWM 30-2, 1 March 1965, is changed as follows:

1. Page Changes. New or revised material is indicated by★.

Remove	*Date*	*Insert*
7 & 9	1 Mar 65	7 & 9

2. Pen-and-Ink Changes:

Page	*Paragraph*	*Action*
1	Lower Left-hand Corner	Change OPR: "CDOT" to "CWH"
5	6, Line 5	Change "September" to "October"
5	6, Line 17	Change "February" to "April"

3. Filing. After posting the changes, file this change sheet in back of the manual.

OFFICIAL

WALTER T. GALLIGAN
Brig General, USAF
Commandant of Cadets

JOHN W. TRIBBLE, SMSgt, USAF
Chief, Cadet Administration Division

DEPARTMENT OF THE AIR FORCE
THE AIR FORCE CADET WING
USAF ACADEMY, COLORADO 80840

1 July 1970

SUBJECT: Honor Operating Instructions

TO: Honor Representatives

The attached instructions are established for the proper handling of Honor Investigations and Hearings and the handling of cadets involved in honor cases. The instructions include provisions from the Cadet Honor Reference Manual and AFR 53-30 and are directive upon the Cadet Honor Committee. The instructions are listed under the following headings:

OPERATING INSTRUCTION #	SUBJECT
1	Conduct of Investigations
2	Conduct of Honor Hearings
3	Procedures for Guilty Cases
4	Honor Records
5	Honor Reading File

/s/ Randall G. Craig
RANDALL G. CRAIG, CIC, TAFCW
Chairman, Cadet Honor Committee

DEPARTMENT OF THE AIR FORCE
EXECUTIVE FOR HONOR AND ETHICS, COC
USAF Academy Colorado 80840

HONOR OPERATION INSTRUCTION 1
1 July 1970

INVESTIGATION OF ALLEGED VIOLATION OF THE HONOR CODE

This operating instruction outlines the procedures to be used by the Honor Committee in the investigation of suspected violations of the Cadet Honor Code.

1. Suspected violations of the Cadet Honor Code will be referred to the Chairman of the Honor Committee who will appoint a three-man team to investigate the incident.

a. This team will seek to find and evaluate the facts and determine whether the situation warrants an honor hearing. The team will normally be composed of two First Class and one Second Class Honor Representatives.

b. When appropriate a member of the Professional Ethics Committee may be included on the team.

c. Where possible the First Class Honor Representative from the suspected cadet's squadron will be included on the team.

d. In cases involving an academic department the Department Liaison Honor Representative will be assigned as a member of the investigation team.

e. The investigating team will contact the Honor Committee legal advisor for advice on the conduct of the investigation.

2. Before taking any testimony from the accused cadet, the investigators will advise him of his rights to remain silent as outlined in Article 31 of the UCMJ. He will be further advised that anything he does say may be used against him in further proceedings.

3. The investigation team will interview and take testimony from all persons who may have information regarding the alleged offense.

4. If the facts and testimony of the case so dictate, the investigation team may decide to drop the case. Following such a decision all parties, officers and cadets, involved in the case should be so notified.

5. If the investigation team and the Chairman of the Honor Committee feel that an honor hearing is required, the accused cadet will be so advised and the Commandant will be briefed on the case by a member of the investigating team. Following this briefing, the hearing will be scheduled as soon as possible.

a. All hearings will be open unless there are extenuating circumstances which dictate a closed hearing. The investigating team will decide whether the hearing will be open or closed.

b. The investigating team will advise the accused cadet that he may call any witnesses he desires to testify in his behalf at the honor hearing.

c. The investigating team will arrange to have all witnesses available to testify at the hearing whenever possible.

/s/ Randall G. Craig
RANDALL G. CRAIG, ClC, TAFCW
Chairman, The Cadet Honor Committee

DEPARTMENT OF THE AIR FORCE
EXECUTIVE FOR HONOR AND ETHICS, COC
USAF Academy Colorado 80840

HONOR OPERATION INSTRUCTION 2
1 July 1970

PROCEDURES FOR HONOR HEARING

This operating instruction outlines the procedures to be used by the Honor Committee in the conduct of an honor hearing.

1. When a hearing is scheduled the Honor Committee Recorder will schedule eight honor representatives from other than the accused's squadron to hear the case as voting members of an Honor Board. Until Recognition Day each spring only first class honor representatives will vote on honor cases. After Recognition Day the second class honor committee will assume responsibility for the administration of the Honor Code and will hear and vote on all cases except those where the accused is a first classman. In first class cases, first class honor representatives will always be used to constitute an Honor Board.

2. Two second class honor representatives will be scheduled for Sergeant-at-Arms duty. The Sergeants-at-Arms will take roll and maintain order.

3. A First or Second Class Honor or Ethics Representative from each squadron will attend each hearing. If the hearing is to closed only Honor or Ethics Representatives will be admitted. If the hearing is to be open each squadron may send two cadets to the hearing.

4. The honor hearing will be presided over by the Chairman, Vice Chairman, or the Secretary of the Honor Committee. The Chairman of a particular Honor Board will not vote unless his vote is needed for the required eight voting board members. Prior to the appearance of the accused cadet, the Chairman will read the prehearing instructions to all present. (See Attachment HOI 2-1).

5. At the hearing the Chairman will advise the accused cadet of his rights under Article 31, UCMJ, and give him an opportunity to object to any of the cadets selected to vote on his case. His objection will be heard and voted upon by a majority vote of the Board. He will be read the instructions contained in Attachment HOI 2-2.

6. A member of the investigation team will brief the board on the facts of the case in the presence of the accused cadet. The accused cadet will then be asked to give the board his explanation of the situation. If he elects to testify, he may be questioned by the board concerning any aspects of the case. Following his own testimony, the accused cadet may call any person to testify in his behalf. All testimony concerning the case will be given in the presence of the accused cadet. The witnesses will remain outside the hearing room until they are called in for their testimony. All witnesses will be subject to the board's questioning and will be seated at the table with the board. Any cadet present at the hearing who desires to testify will be allowed to do so in the above-stated manner.

7. During the hearing of testimony, any cadet present may submit to his Honor or Ethics Representative any question he may have regarding the case. These questions should be submitted in writing. If the Honor Representative feels that the question is appropriate to the case he passes the written question to the Chairman through the Sergeant-at-Arms. The Chairman will then ask the accused or any witness the question.

8. Following the open question period, the board will be closed for deliberations. All persons other than Honor or Ethics Representatives will be asked to leave the room and the results of the deliberations will be briefed by the squadron representative present.

9. Throughout the investigation and hearing of the case an accused cadet will be presumed innocent until proven guilty.

10. During deliberations the board will discuss and vote by secret ballot on the guilty or innocence of all violations considered. Any questions or comments from the Honor or Ethics Representatives present will be made at any time.

11. A verdict of guilty must be unanimous on the part of all eight voting members of the board.

12. If the verdict is guilty, the board may consider granting "discretion." The general guidelines for discretion are:

a. The incident is self-reported.

b. The accused cadet is a Fourth Classman.

c. Some unusual pressure or circumstances in the case.

d. The accused cadet has learned a vital lesson and will be a credit to the Wing in the future.

The granting of discretion requires a 6-2 affirmative vote.

13. After the final verdict is determined, the accused cadet will be informed of the decision.

14. The cadet found not guilty or granted discretion will be returned to the Wing in good standing and without prejudice. The Chairman will remind all cadets present at the hearing that all matters discussed at the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative.

15. A case summary on all cases will be written up and published to the Wing. Not guilty and discretion case summaries will not include the man's name or squadron. Prior to departing the hearing room the Honor Board will determine for the record the significant facts which should be included in the case summary.

16. If significant new evidence is produced following a hearing this evidence will be presented to the Board which voted on that case. By a majority vote the Board will decide whether the case should be reopened to hear the new evidence. If the Board elects to reopen the

case the same Board will rehear and revote on the affected portions of the case.

/s/ Randall G. Craig
RANDALL G. CRAIG, ClC, TAFCW
Chairman, Cadet Honor Committee

2 Attachments
1. HOI 2-1
2. HOI 2-2

Attachment 1 to HOI 2

"May I have your attention. This honor hearing will now come to order. All cadets seated in the audience are reminded that this is a formal honor hearing and they will refrain from smoking and talking when the accused is in the room. When the hearing begins the accused will be asked to explain the circumstances of the case after which the Board members may individually question the accused about the case if the accused elects to testify. If anyone in the audience has any questions or knows any facts which should be brought to the attention of the committee, please hand it in writing to the honor or ethics representative nearest you. Would squadron honor or ethics representatives please raise your hands. He will either answer the question for you or have the Chairman ask the accused the question prior to his departure from the room.

"As soon as the questioning period is completed, additional facts pertaining to the case may be brought to the Board's attention if you desire. Testimony from any witness will be taken and considered in the same manner as that of the accused.

"When all of the evidence has been taken this honor hearing will be adjourned and the Board will deliberate and vote on the case. The Board's findings on the case will be released to the entire Cadet Wing through squadron honor or ethics representatives as soon as possible." All cadets sitting in the audience are invited to remain for

the deliberation period. It is, however, essential that all cadets maintain the maximum degree of order to insure that a fair decision is reached.

The accused should be brought into the room.

"Mr. ————————, this Honor Board has convened to hear evidence and make findings concerning certain allegations that you violated the Honor Code by (lying, stealing, cheating, or toleration).

"Around this table are eight Honor Representatives (excluding myself—if applicable) who will vote on your case. You have the right to object to any voting member if you feel that member cannot render a fair and impartial decision in your case. You must state the reason for your objection and the matter will be decided by a majority vote of the remaining members. Do you wish to object to any of the voting members?

"Mr. ————————, I want to remind you of your rights under Article 31 of the Uniform Code of Military Justice. You will be asked for an explanation of your conduct. However, you have a right to remain silent at this honor hearing and your silence will not be considered as evidence against you. If you elect to testify, you may be questioned by the members of the Board concerning your statements and what you say may be used against you in further proceedings. Do you understand this?

"The Board will first hear the evidence against you. You will then be given an opportunity to testify in your own behalf. The Board will also call any witnesses you desire to testify in your behalf. Although you cannot cross-examine witnesses, if you feel that a witness should answer certain questions which have not been asked by the members of the Board or are not included in a statement, you may call this to my attention and the Board will make the necessary inquiry into the matter.

"Cadet ————————, (Honor Representative heading investigation team), will you summarize the evidence in this case including the statements of all witnesses?"

"Mr. (accused cadet), would you now relate to the Board in your own words the circumstances of the case this ————————." (Give time of situation, date, or action at which you want accused to begin). Ask opening questions based on accused's testimony to gain clarification for the Board. Then allow other Board members to start questioning.

"Mr. ————————, do you have any witnesses or other evidence you would like the Board to consider?"

"Does anyone in the room desire to present evidence or testify regarding the case?"

"Mr. ————————, you are excused while the Board deliberates your case. The Board will now deliberate the case. All cadets are invited to remain. When a member of the audience desires to participate in the deliberation he should write his statement or question on a piece of paper and sign it and then hand it to the chairman. You are reminded that this hearing is confidential to protect the accused. The Board is adjourned. The deliberations will be closed with your squadron honor representative representing you."

Attachment 2 to HOI 2

INSTRUCTIONS TO HONOR BOARD CHAIRMAN

1. During questioning by board members, if you believe some part of his testimony or answer needs to be made more clear, it is your prerogative to ask him a question at any time.

2. Make sure both board members and accused are talking loudly enough.

3. If talking in the audience occurs, ask for quiet in the room. Try to insure they are listening to testimony.

4. Insure no one comes up to a Board member and talks to him while there is any testimony or conversation going on around the Board.

5. Try to avoid repetitive questions.

While audience is questioning:

1. Recognize only those written questions posed through honor representatives.

2. If a Board member desires to ask a question in between questioning of audience, allow Board member to do so.

3. Close questioning when no more questioning from audience or Board members.

During deliberation:

1. Get Board to relax.

2. Open up discussion by clarifying different areas of possible violation. Discuss every aspect of guilt or innocence *before* voting.

3. Write out reasons why decision was reached for not guilty or guilty, and also reasons for discretion or no discretion.

4. Bring in the accused and announce decision to him. If advice from board is appropriate give this to accused. Dismiss the accused.

DEPARTMENT OF THE AIR FORCE

Executive for Honor and Ethics, COC
USAF Academy, Colorado 80840

HONOR OPERATING INSTRUCTION 3

1 July 1970

PROCEDURES FOR CADETS FOUND GUILTY

This operating instruction outlines the procedures to be followed when a cadet is found guilty of violating the Cadet Honor Code.

1. There is implicit in each finding of guilty by an Honor Board a request that the man submit his resignation from the Cadet Wing for violating the Honor Code. However, the man has other alternatives which must be made clear to him. The accused's alternatives are:

a. To resign from the Cadet Wing.
b. To request a hearing before a Board of Officers.
c. To request a trial by court-martial.

2. To insure that the accused understands the consequences of each alternative, the following procedures are to be followed after a finding of guilty when discretion is not granted.

a. The accused cadet will be billeted in Security Flight and the Officer-in-Charge will be advised of the cadet's status.

b. The cadet's AOC will be advised of the results of the hearing.

c. The cadet's parents will be informed by telephone within 24 hours. This call is to explain the situation to them and the alternatives available to their son.

d. On the morning following the honor hearing the cadet will be given legal counsel to insure that he understands the implications of each of his choices. After legal briefing, he will be required to make a decision to resign or to appeal the decision of the Honor Committee.

e. If he elects to resign he will so designate on his legal counseling sheet and return to COCHE. Following this decision he will not attend further classes. He will then be scheduled for an exit interview with the Commandant of Cadets or his designated representative.

f. Following his exit interview the cadet is turned over to his AOC for out-processing. Until this processing is complete the cadet will be billeted in Command Post and attend all meals with the CCQs.

3. In cheating cases, CRR should be notified immediately to enable them to correct academic records.

4. Cadets found guilty of honor violations by an Honor Board may elect to take their case before a Board of Officers conducted in accordance with AFR 11-1. The cadet who elects this option will be returned to his squadron and will attend all classes and formations until the board action is complete. The SJA will assign the cadet legal counsel to represent him at the Board.

5. An officer will be assigned to investigate the case and to make a recommendation to the Superintendent regarding whether the case should be referred to a Board of Officers. If the Superintendent so elects the case will be sent to a Board of Officers for their findings and recommendation. If the Board finds the man "not guilty" he will be returned to the Wing in good standing. If the man is found guilty and dismissal is recommended the accused will be dismissed from the Academy for conduct.

/s/ Randall G. Craig
RANDALL G. CRAIG, CIC, TAFCW
Chairman, Cadet Honor Committee

DEPARTMENT OF THE AIR FORCE

Executive for Honor and Ethics, COC
USAF Academy Colorado 80840

HONOR OPERATING INSTRUCTION 4

1 July 1970

HONOR RECORDS

This operating instruction explains the need and procedures for COCHE's keeping of records on honor cases.

1. It is mandatory that COCHE keep complete records regarding all aspects of the operation of the Cadet Honor Committee. These records should include the details of instruction, specific cases, and general policy decisions. From these records current and complete statistics may be obtained. These statistics can be used to give insight into particular trends in the operation of the honor system.

2. The following records should be maintained by COCHE.

a. Honor Review Committee minutes. The Honor Review Committee should meet at least twice each year to review the operation of the Honor Committee and to make recommendations to the Honor Committee through the Superintendent. The minutes of these meetings provide a prime source of Honor Code history for future reviewers.

b. Honor Case Index. Each honor case is given a case designation (e.g. AK) and the specifics of date of hearing, finding, class, squadron, alleged offense, and name and service number of those cadets found guilty.

c. Honor Briefs. Following each honor hearing a case summary will be written to cover the facts of the case. This summary will be filed in the Honor Briefs and under the case designator index. Included in the brief will be class, date, verdict, and alleged offense information.

d. Guilty Case Summaries. In each guilty case a case summary is written up for publication to the Wing after the man departs. A copy of these summaries is filed under Guilty Case Summaries.

/s/ Randall G. Craig
RANDALL G. CRAIG, CIC, TAFCW
Chairman, Cadet Honor Committee

DEPARTMENT OF THE AIR FORCE

Executive for Honor and Ethics, COC
USAF Academy, Colorado 80840

HONOR OPERATING INSTRUCTION 5

1 July 1970

HONOR CODE READING FILE

This operating instruction outlines the procedures for maintaining the Honor Code Reading File.

1. To enhance the requisite understanding and involvement in the Honor Code, copies of the Honor Code Reading File are maintained in each faculty department and in several other staff agencies. (See Attached List). These books are structured to give the new man a basic understanding of the Cadet Honor Code precepts and administration and a feel for the actual application of these precepts by the Honor Committee.

2. The Honor Reading File Notebooks should be recalled by COCHE each August for updating. During the year a copy of each guilty case summary should be sent out to the following offices for inclusion in their Reading Files:

a. SUPT
b. COC
c. CDW
d. CG-1, CG-2, CG-3, CG-4
e. CDI
f. CDOP
g. DF

Not only should guilty cases be included but representative "not guilty" and "discretion" cases should be included in the notebooks.

/s/ Randall G. Craig
RANDALL G. CRAIG, CIC, TAFCW
Chairman, Cadet Honor Committee

DISTRIBUTION—HONOR CODE READING FILE

Office/Dept		Office/Dept	
01	SUPT	21	DFEE
02	DF	22	DFEM
03	COC	23	DFENG
04	DA	24	DFF
05	COCHE	25	DFG
06	CDW	26	DFH
07	CDI	27	DFL
08	CDOP	28	DFMA
09	CG-1	29	DFP
10	CG-2	30	DFPA
11	CG-3	31	DFPO
12	CG-4	32	DFPSL
13		33	DFSLB
14	DA (Physical Ed Div)	34	CH
15	DA (Intercollegiate Div)	35	MSHMH and DSUR
16	DFAN	36	MS
17	DFAST	37	PSC
18	DFC	38	DOI
19	DFE	39	CRCAS
20		40	COCHE (extra)

USAF ACADEMY REGULATION NR 20-9
HEADQUARTERS, U.S. AIR FORCE ACADEMY

COLORADO 18 November 1965

Organization and Mission—General

USAF ACADEMY HONOR REVIEW COMMITTEE

This regulation establishes the USAF Academy Honor Review Committee, specifies membership, and outlines its duties and responsibilities.

1. Purpose. To provide a periodic review of the administration of the Cadet Honor Committee.

2. Duties and Responsibilities.

a. Make periodic evaluation of concept and administration of the Cadet Honor Code and make recommendations to the Commandant of Cadets and Superintendent.

b. Perform liaison function between the Cadet Honor Committee and the USAF Academy staff and faculty in matters pertaining to concept and operation of the Honor Code.

c. Foster mutual understanding and coordination among the various programs for character training conducted by activities of the Dean of the Faculty, Commandant of Cadets, Chaplain and Department of Athletics.

d. Receive nominations and make recommendations annually to the Cadet Awards Committee for a recipient of the "General Hester" Award.

3. Composition.

a. Chairman (designated by the Superintendent).
b. Staff Judge Advocate.
c. OIC of the Cadet Honor Committee.
d. Chaplain.
e. Representatives from Dean of the Faculty.
f. Representatives from Commandant of Cadets.
g. Representative from Director of Athletics.

h. Representative from the Flight Surgeon.
i. Recorder (designated by the Chairman).
j. Representative from the USAF Academy Preparatory School.
k. Representative from the Registrar.

4. Meetings. The Chairman will call meetings.

5. Records. The Recorder will prepare a record in the form of minutes for each Honor Review Committee meeting.

OFFICAL:

THOMAS S. MOORMAN
Lieutenant General, USAF
Superintendent

/s/ Robert V. Crandall
ROBERT V. CRANDALL
Major, USAF
Deputy Director Administrative Services

OPR: COC
DISTRIBUTION: A

EXHIBIT 8

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 12-30

7 July 1970

Documentation

DISCLOSURE OF AIR FORCE RECORDS

This regulation implements 5 U.S.C. 552 and DOD Directive 5400.7, June 1967. It states basic policies and instructions governing the disclosure of records; authorizes use of the term "FOR OFFICIAL USE ONLY"; and tells members of the public what they must do to inspect or obtain copies of records. It is published in title 32 C.F.R. 806. It applies Air Force wide. In case of a conflict, this regulation takes precedence over any existing directive dealing in whole or in part with the disclosure of records.

Paragraph

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Supersedes AFR 12-30, 16 July 1969. (For summary of revised, deleted, or added material, see signature page.)

OPR: AFDASB

DISTRIBUTION: B

SECTION A—GENERAL INFORMATION

1. Types of Requests Covered by This Regulation:

a. This regulation governs the disclosure or denial of documentary material to the general public.

b. In addition to the general policies and procedures required by this regulation, many types of requests for information and records are subject to specialized or limited release procedures. Some of these are shown below. For a more complete listing, see AFR 190-12 (when published).

Type of Request	Governing Directive
Congressional	AFR 11-7
General Accounting Office	AFR 11-8
Litigation	AFR 12-30, AFR 110-5
Unclassified records of trial after courtsmartial	AFM 111-1
News media	AFR 12-30, AFR 190-12
Military personnel records	AFR 31-6
Accident/incident investigation and report	AFR 127-4
Procurement information or records	Armed Services Procurement Regulations
Inspector General reports	AFR 120-3

SECTION B—POLICIES GOVERNING DISCLOSURE OF RECORDS

2. Basic Policies on Disclosure:

a. It is the policy of the Departments of Defense and the Air Force to make available to the public the maximum amount of information and records concerning their operations and activities.

b. This basic policy is subject to the necessary exception, recognized in 5 U.S.C. 552(b) and discussed in paragraph 4, that certain records and other documentary material need not be made public. However, even when

nondisclosure is authorized by 5 U.S.C. 552(b) and paragraph 4, requested records and other documentary material should be disclosed if no significant purpose is served by withholding them. The determination of whether a significant purpose is served by withholding information under provisions of paragraph 4 is within the sole discretion of the Air Force.

c. Determination that a record should be withheld must not be influenced by the possibility that its release might suggest administrative error or inefficiency or might embarrass the Air Force or an official of the Air Force.

3. Specific Policies on Disclosure:

a. Any identifiable documentary material in the possession of the Air Force that qualifies as a "record" according to b *below* and is not exempted under paragraph 4 should be made available on the request of any person.

b. In determining whether documentary material qualifies as a "record," 44 U.S.C. 3301, quoted below, should be used as a guide.

> "As used in this chapter, "records" includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them."

(1) The term "records" does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimensional models, vehicles, equipment, etc., whatever their historical value as "evidence."

(2) Records are not limited to permanent or historical documents; they include contemporaneous ones as well.

c. For a record to be considered "identifiable" it must exist at the time of request. There is no obligation to create a record to satisfy a request for information. When the information exists in the form of several records at several locations, the requester should be referred to those sources if gathering the information would be burdensome.

d. A requester must be reasonably specific in identifying each record he would like made available. The Air Force is not required to permit a requester to browse through entire files or large series of records to find a record he may then "identify." The Air Force will make a reasonable effort to locate any records requested. A request for a specific record should not be denied solely because the record is maintained by computer.

e. Requests for identifiable records may be denied only when an official designated in paragraph 7c determines that such a denial is authorized by this regulation. Other Air Force directives may contain specific procedures for release or denial of records. (See paragraph 1.)

f. Pursuant to 5 U.S.C. 522(a)(3), requesters are charged the reasonable costs to the Air Force for searching, copying, or certifying records. Charges are determined according to AFR 12-32 or 177-8. Except for any copies that are provided, no charge is made to the public for the use of establishing reading rooms or reference libraries.

g. Official requests for records or other documentary material received directly from foreign governments, their representatives, or international commands, may be answered only by offices holding delegation of disclosure authority letters as described in AFR 200-9. Other recipients will send such correspondence to the foreign disclosure policy office within their major command, or to HQ USAF (AFCVFB).

h. Individual requests received from foreign nationals not officially representing their government will be processed as any other request in accordance with section D. Charges may be waived in accordance with AFR 12-32, paragraph 3r, 28 April 1969.

4. Material That May Be Withheld From Disclosure. Records within the categories listed in a through h *below* are not required to be made available to members of the public. Nevertheless, any record that falls under one of these exempted categories should be made available to a requester if, in the judgment of the disclosure authority designated under paragraph 7, no significant purpose would be served by withholding it.

a. Those containing information requiring protection in the interest of national defense or foreign policy according to the criteria established by AFR 205-1 or by Executive Order.

b. Those containing rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or internal practices of the Air Force. Example include:

(1) Operating rules, guidelines, and manuals for Air Force investigators, inspectors, auditors, or examiners that cannot be disclosed to the public without substantial prejudice to the effective performance of a significant Air Force function. Some of these materials might reveal:

(a) Negotiation and bargaining techniques.
(b) Bargaining limitations and positions.
(c) Inspection schedules and methods.
(d) Audit schedules and methods.

(2) Personnel and other administrative matters such as examination questions and answers used in training courses or in determining the qualification of candidates for employment, entrance to duty, advancement, or promotion.

c. Those containing information authorized or required by statute to be withheld from the public. The authorization or requirement may be found in the statute itself or in Executive Orders or regulations authorized by, or in implementation of, the statute. Examples include:

(1) Documentary material referred to in 18 U.S.C. §§ 1905—trade and financial information provided in confidence by business (see also *e below*).

(2) 35 U.S.C. §§ 181-88—Records containing information relating to inventions that are the subject of patent applications on which Patent Secrecy orders have been issued.

d. Those containing information the Government has received from anyone, including an individual, a foreign nation, an international organization, a State or local government, a corporation, or any other organization, with the understanding, express or implied, that the information will be retained on a privileged or confidential basis; or those containing similar commercial or financial information that the component develops internally, if the information is, in fact, the kind normally considered privileged or confidential. Examples of the types of information that may be within this exemption are:

(1) Commercial information such as research data, formulae, designs, drawings, and other technical data and reports that:

(a) Are significant as items of valuable property acquired in connection with research, grants, or contracts,
(b) If owned by private parties would likely be held in confidence.

(2) Commercial and financial information received in confidence in connection with loans, bids, or proposals, as well as other information received in confidence or privileged, such as trade secrets, inventions and discoveries, or other proprietary data.

(3) Statistical data and commercial or financial information concerning such matters as contract performance, income, profits, losses, and expenditures.

(4) Information customarily considered privileged or confidential under the rules of evidence in the Federal courts, such as information coming within the doctor-patient, lawyer-client, and priest-penitent privileges.

(5) Personal statements given in the course of inspections, audits, or investigations.

(6) Any other information that customarily would not be released to the public by the person from whom it was obtained.

e. Except as provided in (3) *below*, those containing intra- and interagency communications.

(1) One major purpose of this exemption is to insure that frank internal communication and a free exchange of ideas among agency personnel is not inhibited. In this sense it is primarily concerned with opinions, suggestions, recommendations, evaluations, analyses, and discussions, as opposed to records of final actions taken.

(2) Examples of the types of material that may normally be withheld under this exemption are:

(a) Staff papers that discuss a problem or contain advice, recommendations, analysis, suggestions, or evaluations.

(b) Information received or generated by a component preliminary to a decision or action, when premature disclosure would harm the authorized appropriate purpose for which the records are being used.

(c) Draft versions of documents.

(d) Advice, suggestions, or reports prepared on behalf of the Air Force by boards, committees, panels, conferences, councils, commissions, task forces or similar groups that are formed by the Air Force to obtain advice and recommendations.

(e) Records of conversations or communications between Air Force personnel or between such personnel and representatives of other agencies of the Executive branch, if the conversations or communications are merely advisory or preliminary in nature and do not represent any final official action.

(f) Advance information on such matters as proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions when such information would provide undue or unfair competitive advantage to private personal interests.

(g) Inspector general reports, auditor general reports, or other reports of inspections, investigations, or surveys that pertain to safety or the internal management, administration, or operations of the Air Force.

(h) Records that are exchanged among Air Force personnel or within and among Government agencies pre-

paring for legal proceedings or anticipate proceedings before any Federal, State, or military court or regulatory body.

(i) Records of Air Force evaluations of contractors and their products or services that, in effect, constitute advice or recommendations and could be used improperly to the advantage or detriment of private interests.

(j) Reports of proceedings to select personnel for assignment, school, promotion, retention, and similar purposes.

(3) Any such intra- or interagency records or other documentary material that would routinely be made available through the discovery process in the course of litigation with the agency may not be withheld. However, if the material would only be made available through the discovery process by special order of the court, based on the particular needs of a litigant balanced against the interests of the agency in maintaining its confidentiality, then the record or document should not be made available to a member of the public.

f. Those containing information from personnel and medical files.

(1) When the sole and exclusive basis for withholding such information is protection of the personal privacy of a person, the information should not be withheld from him or from his designated legal representative.

(2) An individual's personnel or medical files may be withheld from him or from his designated legal representative for reasons other than the protection of his personal privacy when Civil Service Commission regulations or other regulations so authorize.

g. Those containing information from files similar to medical and personnel files where there would be a clearly unwarranted invasion of the personal privacy of a person if the information were disclosed.

(1) Examples of similar files are those:

(a) Compiled to evaluate or adjudicate the suitabiltiy of candidates for civilian employment and the eligibility of individuals, whether civilian, military or industrial, for security clearance.

(b) Containing reports, records, and other material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken or has been taken.

(c) Containing information about an individual's personal or financial affairs that the individual would not normally disclose publicly. Included are:

1. DD Form 1555, "Confidential Statement of Employment and Financial Interests-DOD Personnel."

2. DD Form 1555-1, "Confidential Statement of Employment and Financial Interests (for use by special DOD Employees)."

(2) In determining whether the release of information would result in a clearly unwarranted invasion of privacy, consideration should be given, in case such as those involving alleged misconduct, to:

(a) The amount of time that has passed since the alleged misconduct.

(b) The degree to which the individual's privacy has already been invaded, and

(c) The relationship of the alleged misconduct to an employee's official duties. The release of information concerning alleged misconduct that is closely related to official duties, has occurred recently, and has already been exposed to the public is less likely to constitute a clearly unwarranted invasion of personal privacy.

(3) When the sole and exclusive basis for withholding information is protection of an individual's personal privacy, the information should not be withheld from him or from his designated legal representative.

(4) Information from such files may be withheld from an individual or from his legal representative for reasons other than protection of his personal privacy when authorized by Civil Service Commission regulations or other directives.

h. Those containing information from investigatory files compiled to enforce civil, criminal, or military law, including Executive Orders or regulations validly adopted pursuant to law. Included within this exemption are:

(1) Reports, statements of witnesses, and other material based on the information developed during the course of an investigation and all materials prepared in connection with related Government litigation and adjudicative proceedings. OSI reports, for example, concerning suspected violations of the Uniform Code of Military Justice and other laws come within this provision.

(2) Investigatory files compiled to enforce Executive Orders or the directives of a component of the Department of Defense.

(3) Lists or identifications of firms or individuals suspended under procurement regulations when the lists are compiled in connection with investigations of irregularities.

SECTION C—"FOR OFFICIAL USE ONLY" MATERIAL

5. Use of the Term "FOR OFFICIAL USE ONLY":

a. Unclassified records and other documentary material will be considered as being "FOR OFFICIAL USE ONLY" if they are authorized to be withheld from general public disclosure under paragraph 4, and if, for a significant purpose, they should not be given circulation.

b. A record that is considered "FOR OFFICIAL USE ONLY" may be marked "FOR OFFICIAL USE ONLY" when such marking is deemed necessary to insure that all persons having access to the record are aware that it should not be publicly released and should not be handled indiscriminately. Individual folders, records, and files covering specific kinds of subject matter, normally falling within the exemptions in paragraph 4, such as personnel, and medical files, bids, proposals, and the like, which are covered by rules and regulations specifying what may be released publicly do not require the marking unless transmitted under circumstances where marking is essential to insure protection of the information involved.

(1) The marking must not be used on records or other documentary material classified for security reasons; but if otherwise proper under this regulation, the marking may be applied to records or other documentary material that has been declassified. For detailed procedures on the marking, control and protection of "For Official Use Only" material see AFR 12-31.

(2) Information contained in a technical document for which a distribution statement under AFR 310-2 is determined to be appropriate is not marked "FOR OFFICIAL USE ONLY."

6. Disclosing "FOR OFFICIAL USE ONLY" Information:

a. Material considered "FOR OFFICIAL USE ONLY" must be safeguarded from general disclosure whether or not the material is marked "FOR OFFICIAL USE ONLY."

b. Records or other documentary material improperly marked "FOR OFFICIAL USE ONLY" may not be withheld from public disclosure.

c. Material properly considered "FOR OFFICIAL USE ONLY" under paragraph 5a does not mean that it must be withheld from all requesters. It only indicates that the material should be given limited circulation. It may be made available to one requester when no significant purpose would be served by withholding the material from him, yet denied to another.

For example, a person's personnel records may be considered to be "FOR OFFICIAL USE ONLY," yet normally they would be released to him. Similarly, and otherwise releasable document containing proprietary information would be considered "FOR OFFICIAL USE ONLY," yet no significant purpose would be served by withholding it from the firm that had submitted it to the Government.

SECTION D—PROCESSING REQUESTS TO INSPECT OR COPY RECORDS

7. Persons Authorized To Disclose or Not To Disclose Records Requested by Members of the Public:

a. Anyone having the authority to disclose and release unclassified records and other documentary material is called a disclosure authority. Except for categories of records listed in d *below*, or as specially authorized by other Air Force directives, the following have authority to make available unclassified records or other documentary material:

(1) Chiefs of offices at directorate or higher level at HQ USAF.

(2) Commanders at major command or comparable level. Major commands may delegate this authority to directorate or comparable level at major command headquarters, and to the level of installation, wing or comparable commanders.

b. In each case the authority to release records and documentary material of a routine nature which heretofore by policy or practice have been made available to the general public may be delegated to a lower level, but must be maintained high enough to insure that releases are made by a responsible authority and are in accordance with this regulation. Examples of such types of records and documentary material are: unclassified publications, photographs, local reports and statistics, etc., not designated "FOR OFFICIAL USE ONLY."

c. When appropriate under this regulation, a disclosure authority at the major command or comparable level or directorate or higher authority within HQ USAF is authorized to *refuse to make available* unclassified records or other documentary material to members of the public. Commanders of major commands may delegate this authority to directorate or comparable level at major command headquarters, and to the level of installation, wing, or comparable commanders. Such delegation must be made with sufficient restrictions to insure uniformity in release policies, and must include, as a minimum safeguard, a procedure for consultation with the

major command Staff Judge Advocate before denial of a request. (See also d *below.*)

d. The activities and persons listed below may either disclose, or refuse to disclose, the types of records cited when appropriate under this regulation.

Type of Record	Disclosure Authority
(1) For use in litigation	The Judge Advocate General, or other authority listed in AFR 110-5.
(2) Records of trial after courtsmartial	The Judge Advocate General, or other authority listed in AFR 111-2.
(3) Medical Records	The director of base medical services or a designated medical officer, subject to the requirements of AFM 168-4.
(4) Inspector General reports of investigation	Secretary of the Air Force as outlined in AFR 120-3.
(5) Accident/Incident Investigations (ground/explosives accidents are excluded from this requirement).	Secretary of the Air Force, as outlined in AFR 127-4.

e. A copy of each denial made per authority of this paragraph will be sent to HQ USAF (AFJAL) Wash DC 20330, along with a copy of the request being denied.

8. Responsibilities of Disclosure Authorities Listed in Paragraphs 7a and b. Disclosure authorities listed in paragraphs 7a and b, proceed as follows when they receive requests from members of the public.

a. If the Material Requested	Then the Activity
(1) Is not in the activity's possession.	Sends the request direct to the appropriate activity, if known; to HQ USAF (AFDASBA) WASH DC 20330, if not known.
(2) Has been marked or designated "FOR OFFICIAL USE ONLY" by a higher authority or appears to be of primary interest to a higher authority.	Sends the request to the higher authority for disposition.

b. If the material requested does not fall within a (1) and (2) *above*, it should be made available to the requester, unless it is determined to be "FOR OFFICIAL USE ONLY" under paragraph 5a. In determining whether the material should be made available, the disclosure authority must consult with at least the following:

(1) *The Staff Judge Advocate.* This is not necessary, however, if the staff judge advocate has issued a general opinion as to the releasibility of the particular type of record or documentary material requested.

(2) *The Information Officer.* If necessary the information officer will inform the appropriate public affairs officials in advance when a record containing potentially newsworthy material is to be released or it is likely that a withholding action will be contested. *For example*, the Secretary of the Air Force, Office of Information (SAFOI), and the major command should be informed when the material involved is of national or international significance.

c. Where appropriate, the disclosure authority may consult with higher headquarters or other activities or agencies having an interest in the requested material. *For example*, if his activity was the recipient of a document, he may wish to consult the originator. Conversely, if his activity was the originator, he may wish to consult the recipient.

d. If the disclosure authority determines that the requested material may be made available, he will take one of the following actions:

If the Requester Asked	Then the Disclosure Authority Will
(1) To inspect the documentary material	Tell him when and where the material may be inspected. If a fee is to be charged under AFR 12-32 or 177-8, inform him of the cost and, except for urgent requests, tell him he must pay this amount before inspecting the document.

(2) For a copy of the documentary material	Inform him of the fee required under AFR 12-32 or 177-8 and tell him that after payment, except for urgent requests, the activity will furnish him a copy or copies of the document. (After payment, or before payment for urgent requests, the copies should be produced as fast as possible without impairing the activity's ability to perform other duties.)

e. Disclosure authorities who are not authorized by paragraph 7c to refuse to make available unclassified records or other documentary material should send any proposed denial to the next higher refusal authority for decision. The submission should include the case file and a statement of reasons for not disclosing the requested material.

f. If the disclosure authority authorized by paragraph 7c determines that the requested material should not be disclosed he should follow the procedures in paragraph 10.

9. Responsibilities of the Disclosure Authorities Listed in Paragraph 7d. Activities listed in paragraph 7d follow their own procedures in processing requests. However, the determination as to whether material should be made available must be made in accordance with this regulation.

10. Responsibilities of a Disclosure Authority Who Is Authorized To Refuse To Make Documents Available:

a. If he decides to approve a request when a subordinate disclosure authority has recommended denial, he instructs the disclosure authority to make the document available under paragraph 8d.

b. If he determines that the document should not be made available, he sends the requester an original and at least one copy of a letter notifying him that his request is denied. (See attachment 1 for suggested format.) At the minimum this letter must:

(1) Inform the requester that his request is being denied because the requested record contains information falling within one or more of the exemptions in paragraphs 4a-4h (state which exemption or exemptions apply), and is thus exempted from mandatory disclosure under 5 U.S.C. 552(b).

(2) Inform the requester of the appeal procedure in paragraph 15.

c. He should keep a complete file on the case for use in the event of an appeal.

11. Responsibilities of Directors and Chiefs of Administration. Within each activity, the office of the director or chief of administration is the office with primary responsibility for handling requests for records or other documentary material. As such, it will:

a. Be the primary point for:

(1) Receiving and processing requests for records and documentary material.

(2) Providing facilities and services for inspecting, copying, and furnishing extra copies of records and other documentary material.

(3) Collecting fees and charges when appropriate. Charge for publications and forms and for copying, certifying, or searching records according to AFR 12-32 or 177-8. If a request is received for a publication that the AFR O-series indicates is on sale at the Government Printing Office, inform the requester that:

(a) A copy will be provided for him at the prevailing rate, if he desires; but

(b) He may be able to purchase the document at a lower price from the Superintendent of Documents, US Government Printing Office, Wash DC 20402.

b. Make available to the general public master publication libraries established under AFR 5-31. Do not charge for normal research services provided. Standard and recurring departmental publications not marked "FOR OFFICIAL USE ONLY" will be made available without review in accordance with AFR 12-31, paragraph 4a. Requests for standard and recurring de-

partmental publications marked "FOR OFFICIAL USE ONLY" will be referred to HQ USAF (AFDASBA) Wash DC 20330. Publications containing copyright material may be made available for public inspection. However, the copying or sale of such publications may be restricted. Refer publications containing copyright material to the OPR for processing in accordance with AFR 110-8.

c. Establish coordination and local working agreements between Administration reference libraries and other functional areas that maintain technical, professional, and specialized types of documentation.

d. Send each request for records to the appropriate disclosure authority listed in paragraph 7. If more than one activity possesses a record or have a substantial interest in it, send the request to the higher of the activities.

e. Notify the requester that his request cannot be satisfied when the record is not sufficiently identified. Request that he send further identification if possible. This kind of notification is not considered a denial under paragraph 15.

f. Send requests promptly and direct to other Government agencies when the requested documentation is in their possession. Notify the requester of the referral. When the request is for copies of material primarily concerning a member of Congress or a congressional committee, or for transcripts of testimony given before a congressional committee refer the requester to the member or committee involved.

12. Expedited Handling Required. Activities at all echelons must expedite their handling of any request from members of the public to inspect or copy records. They should make every effort to avoid creating procedural obstacles when internal Air Force organizational problems arise, particularly where reorganization or transfer of function contributes to an improperly directed request. Air Force personnel will make all reasonable efforts to assist private persons in directing requests for records and other documentary material to the appropriate authorities. (See AFR 11-25.)

SECTION E—HOW THE PUBLIC SUBMITS REQUESTS FOR DOCUMENTS

13. Identifying Material Requested. Request to inspect or obtain copies of records or other documentary material normally should be made in writing. It should contain at least the following information:

a. An identification as complete as possible of the desired material, including (if known) its title or description, its date, and the issuing authority.

b. With respect to matters of official record concerning civilian or military personnel, the first name, middle name or initial, surname, date of birth, and social security account number of the individual concerned, if known.

c. A statement as to whether the requester wishes to inspect the record or obtain copies of it.

d. Standard Form 180, "Request Pertaining to Military Records," is used by Federal agencies to obtain information from military service records that are in the National Personnel Records Center (Military Personnel Records). Agencies may furnish copies of SF 180 to the public to facilitate unofficial inquiries and may direct nongovernment organizations to the Superintendent of Documents to purchase quantities of the form.

14. Addressing Requests. Requesters should address their requests as follows:

Nature of Request	Address
a. For matters of official record for use in litigation,	HQ USAF (AFJALF); Wash DC 20330, or the activity where the record is located, if known.
b. For matters of record concerning civilian employees currently employed by the Air Force.	Civilian personnel officer of base or activity where person is employed.
c. For matters of record concerning civilian employees no longer employed in the Federal service,	National Personnel Records Center, GSA, (Civilian Personnel Records). 111 Winnebago St St Louis MO 63118.

Nature of Request	Address
d. For matters of record concerning members and former members of the Air Force, Air Force Reserve, or Air National Guard.	See attachment 2.
e. For matters of record concerning standard (administrative type) publications, that is Air Force Regulations, Manuals, Pamphlets, etc.	HQ USAF (AFDASBA) or Director of Chief of Administration of any Air Force Base.
f. For matters of record concerning Air Force technical, supply and engineering publications and data.	See attachment 3.
g. For matters of record concerning Major Command standard (administrative) type publications.	Director of Administration of the major command concerned.
h. For other records, where the location of the record is known,	Director or Chief of Administration, activity where record is located.
i. For records retired to records centers or other repositories.	See AFM 12-50, chapter 8, and attachments 2 and 3.
j. For other records, where location is not known,	HQ USAF (AFDASBA) Wash DC 20330.

SECTION F—APPEALS FROM REFUSALS TO MAKE RECORDS AVAILABLE

15. Filing an Appeal:

a. A person whose request to copy or inspect a record or other documentary material is denied may appeal this decision to the Secretary of the Air Force within 45 days of denial. A requester will not be considered to have exhausted his administrative remedies within the Department of the Air Force unless such an appeal has been filed and a Secretarial decision has been made. This decision will be final action of the Air Force on the request.

b. The appeal should be addressed to the Secretary of the Air Force and sent through the disclosure au-

thority who denied the request. Any statement of reason or arguments must be submitted in writing when the appeal is filed. A personal appearance is allowed only at the discretion of the Secretary.

c. The disclosure authority will promptly send the appeal and, if practicable, a copy of the record requested to HQ USAF (AFJAL), Wash DC 20330, for processing. If the requested record is too voluminous to send, a description thereof may be substituted. However, sufficient information to permit disposition of the appeal must be included.

16. Processing an Appeal:

a. HQ USAF (AFJAL) will either release the requested record or send the appeal to the Secretary (SAFAA) for decision. If the appeal is denied, the decision must be explained to the requester in writing.

b. A copy of his explanation is sent to the General Counsel, Department of Defense, Wash DC 20301, if the requester seeks reconsideration by the Secretary, or initiates legal action to compel release of the record.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JOHN D. RYAN, *General, USAF*
Chief of Staff

JOHN F. RASH, *Colonel, USAF*
Director of Administration

Summary of Revised, Deleted, or Added Material

This regulation adds references to other Air Force directives (para 1 and 7d(5)); changes the procedure for handling official requests from foreign governments (para 3g); requires that a copy of each letter of denial be sent to HQ USAF (AFJAL), (para 7e); adds locations for obtaining specific publications (para 14 and atch 3); and changes the method of handling appeals (paras 15 and 16, and atch 1).

SAMPLE FORMAT FOR LETTER DENYING REQUEST FOR ACCESS TO OR FOR OBTAINING COPY OF INFORMATION OF RECORD OR DOCUMENTARY MATERIAL

Office Symbol

Request for Copy of (or Inspection of) (Identify Information Requested)

(Requester's Name and Address)

1. (The) (a portion of the) information requested in your letter of (date) is exempt from disclosure under Pub. L. 90-23, 5 U.S.C. 552(b). It is not releasable because it contains information that (copy from or summarize the applicable subparagraphs of AFR 12-30, paragraph 4).

2. The decision to withhold release of this information may be appealed in writing to the Secretary of the Air Force within 45 days from the date of this letter. Include in your appeal any reasons for reconsideration you wish to present, and attach a copy of this letter. Address your letter as follows: Secretary of the Air Force, thru (Example: HQ AFLC (MCGSD), Wright-Patterson AFB OH 45433). NOTE: If this is a partial denial of the request, add the following paragraph if copies of releasable records are to be sent.

3. Copies of the releasable portion of the information you requested (are attached) (will be sent by separate letter).

(Signature of Authorized Disclosure Authority)

(Stamped (or typed) Name, Position, Title, and Office of Disclosure Authority)

Note: Vary the format to fit the circumstances. Send it in duplicate. Prepare individual letter in each case. Do not use forms.

Records of members and former members of the Air Force are maintained in different locations depending on the member's current status. Accordingly, requests for such records should be addressed as indicated in Table 1:

TABLE 1

ADDRESSING REQUESTS FOR RECORDS OF MILITARY PERSONNEL

RULE	A If the individual is presently	B and he is/was	C then inquiry should be addressed to
1	on extended active duty	a commissioned officer or warrant officer	his organization of assignment, if known, otherwise: USAFMPC(AFPMDRO) Randolph AFB TX 78148.
		an airman	his organization of assignment, if known, otherwise: USAFMPC(AFPMDRA) Randolph AFB TX 78148.
2	a member of the Air Force Reserve not on extended active duty	a commissioned officer, warrant officer, or airman	ARPC 3800 York St Denver CO 80203.
3	a member of the Air National Guard not on extended active duty	a commissioned officer or warrant officer	Chief, National Guard Bureau (NG-AF) Wash DC 20310.
		an airman	Air Adjutant General of the appropriate State, District of Columbia, or Commonwealth of Puerto Rico.
4	retired for temporary physical disability	a commissioned officer or warrant officer	USAFMPC(AFPMDRO) Randolph AFB TX 78148.
		an airman	USAFMPC(AFPMDRA) Randolph AFB TX 78148.
5	retired (with pay)	a general officer	USAFMPC(AFPMDRO) Randolph AFB TX 78148.
		other than a general officer	National Personnel Records Center (Military Personnel Records) 9700 Page Blvd St Louis Mo 63132.
6	former members who no longer have an Air Force affiliation	a commissioned officer, warrant officer or airman	

Note: If member's status is unknown, address request to USAFMPC (AFPMDRF) Randolph AFB TX 78148.

BEST COPY AVAILABLE

ADDRESSING REQUESTS FOR AIR FORCE TECHNICAL, SUPPLY, AND ENGINEERING TYPE PUBLICATIONS AND DATA

Type of Publication	Address
Air Force Technical Orders (TOs). Consist of technical manuals on operations, maintenance, service overhaul, installation and inspection of Air Force equipment and illustrated parts. If the specific TO number is not known furnish complete description of the TO desired including the name of the equipment, manufacturer, model, serial, part number and any other identifying information on the particular equipment.	OCAMA (OCNSU) Tinker AFB OK 73145
Air Force Technical Reports (TRs). When definite source is not known	ASD (ASAD) Wright-Patterson AFB OH 45433
USAF and DOD Federal Supply Catalogs, Master Cross. Reference Indexes and Related Cataloging Publications, indexed in "USAF S-2A-1."	AFLC (MCGSD) Wright-Patterson AFB OH 45433
Exceptions: Cataloging Handbooks (H2-1, H2-2, H3, etc) and Federal Manuals for supply cataloging (M1-1, M1-2, M1-3, etc).	Superintendent of Documents US Government Printing Office Washington DC 20402
Engineering Drawing and Associated Lists.	AFLC (SGLD) Wright-Patterson AFB OH 45433
Air Force Procurement Instructions (AFPIs) and Armed Services Procurement Regulations (ASPRs).	Superintendent of Documents US Government Printing Office Washington DC 20402
Air Force Precurement Instructions (71 Series-Contract Provisions. Indexed in AFR 0-11).	AFLC (MCGSD) Wright-Patterson AFB OH 45433
Specifications, Standards, Military Handbooks, etc. Indexed in the Department of Defense Index of Specifications and Standards (DODISS).	Naval Publication and Forms Center 5801 Tabor Ave Philadelphia PA 19120

NOTE: The index (including part 1, alphabetic listing, and part 2, numerical listing) may be purchased only from Superintendent of Documents, US Government Printing Office, Wash DC 20402.

BEST COPY AVAILABLE

3 February 1972

Lt Michael T. Rose
Box 4J
33 Washington Square West
New York, New York 10011

Dear Lt Rose

1. In response to your letter of 27 January 1972, I believe AFR 53-3 will answer many of your questions.

2. A number of the questions posed require research. My office does not have the capability to assist in extended research projects such as yours.

3. Some of the information (documents or records) requested is not releasable. Other items may be. If you will be more specific as to the records or documents you desire, we can then determine the fees to be paid for printing, copying, or other clerical costs involved. It will be necessary for you to tender these fees to the USAF Academy payable to the Treasurer of the United States before the records can be released to you.

Sincerely

ARTHUR S. RAGEN, Colonel, USAF
Director of Information

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
Washington, D.C. 20313

14 Dec 1971

First Lieutenant Michael T. Rose, USAF
Box 4J
33 Washington Square West
New York, New York 10011

Dear Lieutenant Rose:

The Army General Counsel has asked me to respond to your letter of 15 November 1971 concerning the use of nonjudicial punishment at the United States Military Academy.

Cadets are subject to the Uniform Code of Military Justice, 10 USC 1602(2). The decision to take action against a member of the military by nonjudicial punishment under Article 15 of the Uniform Code of Military Justice or to try him by court-martial for alleged criminal violations is within the sound discretion of the commander concerned. In this connection, the Superintendent of the Military Academy is a commander and a general court-martial convening authority, and has all of the power and authority incident to these positions, including the authority to impose nonjudicial punishment under Article 16 on members of his command. You will find a discussion of the Military Academy cadet and his amenability to trial by court-martial in *United States* v. *Ellman*, 9 USCMA 549, 26 CMR 329 (1958).

In addition to the disciplinary authority of the Superintendent of the Military Academy, which is established by statute, the Superintendent has certain inherent authority as a commander, to include the authority to take non-punitive corrective measures to further the efficiency of his command. This inherent attribute of command is recognized by paragraph 128c, *Manual for Courts-Martial, United States, 1969 (Revised edition)*, and is used by commanders at all echelons throughout the Army.

The command and supervision of the Military Academy are established by 10 USC § 4334. Regulations governing the Academy are promulgated by the Department of the Army and the Military Academy.

The Academy's regulations are maintained in the library at West Point. If you desire further information in this regard, you may wish to write to:

Superintendent
United States Military Academy
West Point, New York 10996

I hope this information is of assistance to you.

Sincerely yours,

[Signed] George S. Prugh
Major General, USA
The Judge Advocate General

cc: GC, DA
Supt, USMA
TJAG, USAF

NEW YORK UNIVERSITY LAW REVIEW
249 Sullivan Street
New York, N. Y. 10012

Box 4J
33 Washington Square West
N.Y., N.Y. 10011
Jan. 27, 1972

Director of Information
USAF Academy, Colorado 80840

Dear Sir:

I have just completed writing the second draft of the portion of my law note which describes the disciplinary systems at the service academies. Could you please clarify a few points for us so that we can insure that we are entirely accurate in describing how the conduct and honor systems at the Air Force Academy work?

My questions are as follows:

1. Could you please inform me what regulation or other written authority delegates (1) authority to the Superintendent from the Secretary of the Air Force to govern the Academy; and (2) authority from the President to the Secretary of the Air Force to administer Air Force and/or Academy affairs? Of course, I am aware of 10 U.S.C. § 9334(a) (1970) which makes the Superintendent the commander of the Academy; of 10 U.S.C. § 121 (1970), which gives the President authority over the Armed Forces; and of 10 U.S.C. § 8061 (1970) which delegates authority to the President to govern the Air Force. But it seems certain that some regulation also delegates authority from the President to the Secretary of the Air Force and from the Secretary of the Air Force to the Superintendent of the Academy. We would not have the applicable Air Force regulations in our library, so could you please inform me what they are?

2. Could you please send me a copy of the Cadet Wing Schedule of Calls? I particularly wish to know the times during which cadets walk tours at the Academy.

3. I have been unable to find the regulation which specifies that a cadet found guilty of violating the cadet honor code will be separated from the Academy, and what type of separation he may receive. I also wish to know whether a cadet may remain in a Regular or Reserve component of the Air Force even though he has been separated from the Academy for violating the cadet Honor Code. Could you please send me the applicable regulations?

4. Could you please inform me about how the conduct hearing boards for Class I and II offenses are now composed? Please inform me when cadets were first allowed to have representatives on CDB boards and who they were first allowed to see compose the total board. Please send all applicable regulations.

5. I am under the impression that the final approving authority for a cadet to be separated from the Academy for violating the honor code is the Secretary of the Air Force. If this is true, please inform me what regulation states this.

I know that I have asked for a lot of information, but to my knowledge I do not have regulations which answer these questions and I need the information to present a complete picture. Similar questions are going to the other academies. I would greatly appreciate your answering these questions as soon as possible.

Thank you very much for your help.

Sincerely,

/s/ Michael T. Rose
MICHAEL T. ROSE
1st Lt., USAF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

—*v*—

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT OF FREDERICK L. METCALF

1. I am the Alumni Secretary on the Superintendent's staff at the United States Air Force Academy. I graduated from the Academy in 1963 with a Bachelor of Science degree.

2. From 1966 to 1967 my predecessor who occupied the Alumni Secretary's position initiated studies on the reasons why graduates of the Academy resigned their commissions in the Air Force. Lt General Thomas S. Moorman, Superintendent of the Academy from 1965-1970, was very interested in knowing the reasons why graduates were resigning. He had two reasons:

a. To use the experiences of graduates on active duty as a basis for recommending change and improvement to training programs at the Academy.
b. To make recommendations to Hq USAF on improvement in the personnel management system.

3. I continued the studies on graduate attitudes when I assumed the Alumni Secretary position in October 1967.

Headquarters, United States Air Force increasingly became interested in the results of the studies and requested that copies be forwarded to them. I included comments of graduates as an appendix to the basic analysis of each study in order to vividly show in the graduates' own words the areas of dissatisfaction he experienced in the Air Force. I intended that these comments be read by people within the Academy chain of command and Air Force chain of command—people who could act upon worthwhile recommendations for change at the Academy and within the Air Force personnel management system.

4. The policy regarding the release of the studies was to make them available to graduates of the United States Air Force Academy as a matter of interest. General Moorman was in agreement with this policy—at least to the extent that he never countermanded the policy that I had established as the author of the studies. I did not release comments of graduates to anyone who indicated that they planned to use the comments for articles to be published in magazines and other forms of public communications.

5. In mid 1971, a free lance writer, Mr. Peter Ognibene, who happened to be an Academy graduate, asked me for copies of the complete studies—including the quoted comments of graduates—in order to do an article for a national magazine. I told him that I would not release comments of graduates to him because of the promise I had given graduates with regard to anonymity. I felt that graduates who had participated in the survey would be very upset if they knew that their frank comments were used by anyone other than myself in preparing evaluations and recommendations. It was at that point that General Clark, Superintendent, decided that it would be best not to release statistics based on the surveys and quoted comments to people, including United States Air Force Academy graduates, who are not in the Academy chain of command or the Air Force chain of command. The intent of the new policy was not to discriminate against any individual graduate. As carried out after General Clark's instructions the statistics and comments

of graduates were not released to anyone. In the case of the writer mentioned above, only the analysis portions of the studies were given to him.

6. I have written to Lt Michael Rose on three occasions. He sent me letters on 21 August 1971 and 5 September 1971 (copies attached) requesting copies of alumni newsletters be sent him if possible. I replied on 28 September (copy attached) and forwarded him the documents he requested and which I had control over. He also asked for two reports with which I was not familiar and could not forward to him. Lt Rose wrote me again on 4 October 1971 (copy attached) to request a copy of the complete May 1969 resignation study and past studies if they existed. I replied on 29 October 1971 (copy attached) and forwarded to Lt Rose a copy of the analysis part of the May 1969 study and also the analysis part of an October 1969 study I had also accomplished. Pursuant to the revised policy regarding the release of the studies I did not send him the parts relating to general statistics and quoted comments. Lt Rose again wrote on 18 November 1971 (copy attached) requesting a copy of the United States Air Force Academy's *Five Year Plan.* I replied on 21 December 1971 by suggesting that he contact the Dean of the Faculty to request a copy of the plan.

7. I strongly believe that the release of the quoted comments of graduates to other authors would seriously jeopardize the rapport that I have established with graduates over the past few years with regard to obtaining their candid views on problems within the Air Force. Publication of material from the studies would seriously hamper further studies and definitely curtail frank responses to questions which often are quite critical to the development of more effective policies at the Academy and within the personnel management system of the Air Force.

8. I have had no requests, correspondence or other contacts with either Charles P. Diamond or Lawrence B. Pedowitz, plaintiffs in this suit.

/s/ Frederick L. Metcalf
FREDERICK L. METCALF

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 26th day of May 1972.

/s/ Beverly J. Ohm
BEVERLY J. OHM,
Notary Public
My commission expires 12 April 1975.

[SEAL]

NEW YORK UNIVERSITY LAW REVIEW
249 Sullivan Street, New York, N.Y. 10012
(212) 777-7560

Box 4J
33 Washington Square West
New York, N.Y. 10003
21 Aug 71

President
Association of Graduates
USAF Academy, Colorado 80840

Dear Major Metcalf:

As shown in the attached copy of my letter to Colonel Kinevan, I hope to visit the Academy in a few days to research facts on the Air Force Academy's administrative disciplinary systems for a law note. I am trying to collect the information I need from as many sources as possible. Every source may have something different to offer. Would you please let me know if you have and can make available to me any information you might have regarding this topic? I would particularly like to learn about any studies that have been done on the subject and about opinions or suggestions on the topic which have been offered by graduates.

Respectfully,

/s/ Michael T. Rose
MICHAEL T. ROSE

Box 4J
33 Washington Square West
New York, N.Y. 10003

5 September 71

Major Frederick Metcalf
Association of Graduates
USAF Academy, Colorado 80840

Dear Major Metcalf:

Please send me the following "documents," if possible, as soon as you can:

1. SUBJECT: "GRADUATE RESIGNATIONS" 29 Sep 1969
2. SUBJECT: "ALUMNI NEWSLETTER" 2 Dec 1970
3. "DEVELOPMENTAL CHANGES IN BRIEF SYSTEMS DURING A SERVICE ACADEMY EDUCATION," GILBERT R. KAATS, REPRINTED FROM THE PROCEEDINGS, 77TH ANNUAL CONVENTION, APA, 1969 pp. 651-652
4. "THE RELATIONSHIP BETWEEN REPORTED AIR FORCE CAREER INTENTIONS AND ADDITIONAL, PERSONALITY AND PERFORMANCE VARIABLES AT THE ACADEMY," WILLIAM J. STRICKLAND, ROBERT D. PENNINGTON, AND HAROLD S. COYLE, JR.

A grad told me he obtained the papers from the Association of Graduate office. Thank you for your assistance.

Sincerely,

/s/ Michael T. Rose
MICHAEL T. ROSE

28 September 1971

Cpt Michael T Rose
Box 4J
33 Washington Square West
New York NY 10003

Dear Mike:

Thank you for your letter of 5 September. Please accept my apologies for this tardy response to it. I have enclosed copies of two alumni publications that you mentioned in your letter. I do not have access to the last two reports you mentioned in your letter. In fact, I have never read them. Undoubtedly I should. I will try to obtain copies. If you are able to obtain them first perhaps you could send me copies. I will do likewise. Again, my apologies for this late response.

Sincerely,

FREDERICK L. METCALF
Capt, USAF
Executive Secretary

2 Atch
As Stated

TELEPHONE
SPRING 7-7560

NEW YORK UNIVERSITY LAW REVIEW
249 Sullivan Street
New York, N.Y. 10012

Box 4J
33 Washington Square West
New York, N.Y. 10011
4 Oct 71

Captain Frederick L. Metcalf
Executive Secretary
Association of Graduates
USAF Academy, Colorado 80840

Dear Captain Metcalf:

Thank you for your letter today and for sending me the materials I had requested. I noticed on page 3 of the letter "Graduate Resignations," 29 Sep 1969, that we are invited to send for a copy of the complete May, 1969, study on graduate resignations. Could you please send me a copy of that published survey.

Also, the "Alumni Newsletter" dated 2 Dec 1970 states on page 1 that "[p]revious studies on resignations have all been directed toward finding out why graduates *leave* the Air Force." If it is true, as that statement indicates, that other studies of why graduates resign from the Air Force or why cadets leave the Academy have been made, please send them to me if possible. Please include any information you might have on reasons for resigning from the other services or academies. Thank you very much.

Sincerely,

/s/ Michael T. Rose
MICHAEL T. ROSE
1st Lt., USAF

29 October 1971

Lt Michael T Rose
Box 4J
33 Washington Square West
New York NY 10011

Dear Mike:

As you requested in your letter of 4 October I am forwarding to you copies of the two 1969 resignation studies. Due primarily to guidance from the Superintendent I have had to delete from the report the statistical part and the part containing the quoted graduate comments. I hope that the abbreviated form of the reports will still be of use to you.

With regard to your question about studies on why cadets leave the Academy, I would suggest that you write to the Director of Cadet Personnel and Administration (CWP).

Sincerely,

FREDERICK L METCALF
Capt, USAF
Executive Secretary

2 Atch
As Stated

TELEPHONE
SPRING 7-7560

NEW YORK UNIVERSITY LAW REVIEW
249 Sullivan Street
New York, N.Y. 10012

Box 4J
33 Washington Square West
New York, N.Y. 10011
November 18, 1971

Captain Frederick L. Metcalf
Association of Graduates
USAF Academy, Colorado 80840

Dear Captain Metcalf:

Would you please send me a copy of *Five Year Plan for the United States Air Force Academy*, May 1968? I would greatly appreciate it. Thank you.

Sincerely,

/s/ Michael T. Rose
MICHAEL T. ROSE
1st Lt., USAF

21 Dec 71

Lt Michael Rose

Please write directly to the Dean of Faculty, USAF Academy, to request a copy of the *Five Year Plan for the USAF Academy*, May 1968.

Best wishes for a joyful holiday season and a prosperous new year.

Sincerely,

FREDERICK L METCALF
Capt, USAF
Executive Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

vs.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

SUPPLEMENTAL AFFIDAVIT OF
FREDERICK L. METCALF

Captain Frederick L. Metcalf, being first duly sworn, deposes and says:

I am the same Frederick L. Metcalf who executed an affidavit in the above entitled action on 26 May 1972. In reference to that portion of the aforementioned affidavit relating to release of statistics, analyses or comments, it is possible that release of any portion of the graduate studies to members of the public and particularly to authors of publications, other than myself, could cause concern among graduates generally about the use to which their frank and confidential answers to questionnaires had been put. At the time I forwarded such questionnaires to graduates in December 1968 and September 1969, I specifically promised anonymity in reference to their responses.

/s/ Frederick L. Metcalf
FREDERICK L. METCALF

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 13th day of June 1972.

/s/ Beverly J. Ohm
BEVERLY J. OHM
Notary Public

My commission expires 12 April 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

vs.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT OF MAJOR CHARLES E. HART

1. My name is Charles Edgar Hart. I am a major in the United States Air Force and a 1960 graduate of the United States Air Force Academy, presently stationed at the United States Air Force Academy. My duty at the Academy is Commandant's Executive for Honor and Ethics and I have served in this position since June 1971. This duty entails being the supervisor and advisor to the Cadet Honor and Ethics Committee.

2. On approximately the first of September, 1971, First Lieutenant Michael T. Rose came to the office of the Executive for Honor and Ethics at the United States Air Force Academy to discuss his interest in writing an article for the New York University Law Review concerning the disciplinary systems at the nation's service academies. He was especially interested in the Air Force Cadet Wing's Honor and Ethics Committees and their administration of the respective Honor Code and Ethics program. I talked with Lt Rose during two periods that totaled more than two hours. We discussed the

changes in the Honor Code and the logic behind Honor Code procedure. Lt Rose seemed intent on describing the Cadet Honor Code as part of the disciplinary system of the Academy and that this disciplinary system should be subject to the rules of criminal law. He suggested that he had gained permission to use Academy records and that I could provide him a list of items including all reference materials used throughout the history of the Honor Code as well as the specific case write-ups. I informed Lt Rose that I would need to check on a release form in the Registrar's office before I could release any case write-ups. He asked more about this form which I could only explain as having a statement on it which permitted the Academy to release the honor cases to certain people or types of institutions and that this form permitted us to answer such things as the requests from educational institutions for the circumstances of a cadet's departure from the Academy. I agreed to forward all the requested items to Lt Rose as soon as I could compile them.

3. After Lt Rose had departed the office, I asked the Vice Commandant if he was aware of what Lt Rose was requesting. The Vice Commandant informed me that no agreement had been made to permit Lt Rose the right of using specific honor cases and that, in fact, Lt Rose had specifically been told he could not have any honor case write-ups. I forwarded a selection of past and present honor manuals along with other honor source material, not including honor case write-ups, to Lt Rose on 8 September 1971.

4. In early October 1971, I received Lt Rose's letter dated 23 September. The delay in delivery was caused by an improper address. The letter asked me to send the honor and ethics case write-ups. On 15 October 1971, I replied to this request stating that all of these cases are documented "For Official Use Only" and are disseminated for internal use only to the Honor Representatives and those few staff personnel who have a continuing need to understand the workings of the Cadet Honor Code. It would, I feel, be in poor faith with all

cadets who have met honor hearings to allow their cases to come into the public eye.

5. In early December, I received Lt Rose's letter of 28 November 1971, requesting write-ups of ethics cases. I was unable to meet his request since we do not keep comprehensive ethics records. In late December 1971 Brigadier General Walter T. Galligan, Commandant of Cadets, received an appeal from Lt Rose to my denial of the write-ups of ethics cases. I prepared for General Galligan's signature, the answer dated 6 January 1972. The reason no explanation was made in that letter regarding Lt Rose's rights of appeal or any reference to the Freedom of Information Act was that during my previous discussions and correspondence with Lt Rose, he advised me that he had certain rights which were available to him if I failed to provide him with the requested information. He told me about his right to appeal to higher authorities in the Air Force as well as his rights under the Freedom of Information Act.

6. I also answered a letter from Lt Rose in January, 1972, inquiring about a speech by Secretary of War, Newton Baker. The only reference I could find was a speech by the Commandant of Cadets in 1955 relating to comments made by Secretary of War, Newton Baker, referring to the value of the honor code as it relates to the military profession. There was no primary documentation in my records.

7. It is my opinion that the write-ups or briefs of honor and ethics cases, even with the names of the parties deleted and even though they might not be notorious, should not be supplied to Lt Rose. There is no way of determining just how these facts will be or could be used. This data could find its way to relatives, friends and classmates of cadets and supply the missing link in disclosing the identity of a guilty cadet. No person who has made a mistake and been punished should have to have this mistake follow him for the rest of his life.

8. I have never received any requests, correspondence or contact with the other plaintiffs in this suit.

/s/ Charles E. Hart
CHARLES E. HART

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 30 day of May 1972.

/s/ Beverly J. Ohm
BEVERLY J. OHM
Notary Public

My commission expires 12 April 1975.

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

v.

DEPARTMENT OF THE AIR FORCE,
ROBERT C. SEAMENS, JR., ET AL., DEFENDANTS

AFFIDAVIT

I, MAJOR RICHARD R. LEE, on my oath do hereby depose and say:

That I am a Tenure Associate Professor of Law at the United States Air Force Academy, Colorado, and have been assigned at the Academy since July 1963. As part of my regularly assigned duties as an instructor and judge advocate, I have been Legal Adviser to the Cadet Honor and Ethics Committees since July 1965. With regard to the Cadet Honor Committee, this additional duty involves giving legal advice and assistance, upon request, to elected Honor Representatives who interpret and administer the Honor Code in the Cadet Wing.

That in early September 1971, a former cadet, Lieutenant Michael T. Rose, came to the Law Department and requested an interview with me concerning an article or note he proposed to write for the New York University Law Review. He stated that he intended to write about the administration of the Honor Code and I discussed this subject with him for approximately two hours.

As a former cadet, Lieutenant Rose was well informed as to the internal operation of the Code. Most of the

interview involved discussion of the requirements of due process of law afforded those cadets who are accused and those who are subsequently found guilty of violations of the Honor Code. It became apparent that Lieutenant Rose believed that the traditional concepts of due process in criminal proceedings should be applicable to all proceedings involving the Honor Code at the Academy, and specifically including the entitlement to counsel. I asked him if he had had a course in Administrative Law in Law School, and he replied that he had not. I then attempted to distinguish administrative and criminal proceedings and the requirements of due process of law applicable to each, and I suggested some reference books and specific cases, including *Dunmar* v. *Alles*, 348 F. 2d 51 (D.C. Cir. 1965), and *Wason* v. *Trowbridge*, 382 F. 2d 307 (2d Cir. 1967), which he might wish to read and study before writing his article. He appeared to appreciate the suggestions and at the conclusion of the interview he asked if he would be permitted to review the files of some specific honor cases and include them in his article in the form of footnotes for the purpose of illustration. I informed him that, in my opinion, such information would be considered a part of the individual cadet's personnel records and, as such, could not be made available to him. I attempted to explain that honor cases are not official public hearings and that such information is both embarrassing and personal to the individual concerned and that the Air Force had a duty to respect, to the greatest extent possible, the rights of privacy of its personnel. I then suggested that he might wish to talk to the officer in Charge of Honor and Ethics, Major Charles E. Hart, and the interview terminated.

I have never met and have never been contacted, by telephone, correspondence, or otherwise, by the other Plaintiffs in this action. Charles P. Diamond and Lawrence B. Pedowitz.

/s/ Richard R. Lee (SEAL)
RICHARD R. LEE, Major, USAF
United States Air Force Academy,
Colorado

STATE OF COLORADO

COUNTY OF EL PASO

Subscribed and sworn to before me this 26 day of May 1972.

/s/ Mary S. Bullock
MARY S. BULLOCK
Notary Public
For the State of Colorado

My commission expires 30 September 1973.

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 72 Civ 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

v.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., ET AL., DEFENDANTS

AFFIDAVIT

I, COLONEL MARCOS E. KINEVAN, Colonel, USAF, on my oath do hereby depose and say:

I am the Permanent Professor and Head of the Law Department and also the Staff Judge Advocate at the United States Air Force Academy. I have been at the Academy since June 1960, except for a two-year (1965-1967) assignment at Headquarters, Pacific Air Forces.

Michael Rose, a plaintiff in the above captioned action, is a 1969 graduate of the Air Force Academy. I recall first meeting him during his first class (senior) year, when he applied for permission to enter law school following graduation. The Academy declined to endorse him, but several months later, I was informed that following his graduation and assignment to duties in the Air Force, Rose had applied and been accepted by New York University's School of Law, and that The Judge Advocate General, USAF, had approved his application for excess leave to attend there.

I heard nothing more of him until I received a letter purportedly from him, dated 21 August 1971 (Atch 1). In this letter, he expressed a wish to write a student note for the NYU Law Review concerning the "administrative disciplinary systems of the five service academies,"

in which he would discuss the "substantive and procedural due process aspects" of the systems, to include an analysis of the proceedings of the Air Force Academy's Cadet Honor Committee, Cadet Ethics Committee, Commandant's Disciplinary Board and "dismissal boards." He stated that such a paper could not be written without the "wholehearted cooperation" of Academy "authorities" and their willingness to assist him. He also expressed concern that his paper might in some way jeopardize his opportunities in the Air Force. He wrote that he would be here between 1 and 10 September, and asked me whether I or "other proper authorities" would object to such a paper, and whether the Law Department and other authorities would assist him in obtaining the information he needed.

On 30 August 1971, I responded to Rose's letter (Atch. 2). In my reply, I first assured him that authoring "an accurate and objective" note should not cause him any concern about jeopardizing his career. I specifically informed him that the practice and procedures he desired to analyze were set forth in Air Force and Academy regulations which were readily available to anyone. However, I went on to suggest to him that the scope of his proposed subject might be far too extensive for a student note, and that he might consider narrowing his study to something he could explore more thoroughly and accurately. Because the information he ostensibly wanted amounted to no more than the specific regulations and directives necessary to supplement the understanding he, as all other cadets, have of the various administrative procedures mentioned, I expressed some confusion as to why he had asked for assistance and cooperation, beyond that of providing him with copies of the pertinent directives. Also, I informed him that if he had something else in mind which would require interviewing officials or researching confidential files, he might better expand his efforts on some other topic because access that that type of personal information, even assuming he obtained the required SAFOI clearance, would not be available to him.

In early September, without further notice, Rose appeared at my office at about 1300 one day, and for the

next hour to hour and a half, we discussed what he had in mind. We talked at length about the various methods, administrative and judicial, under which a cadet might be separated. Also, we discussed in detail the length to which the Academy goes to assure due process to cadet respondents before administrative boards (e.g., the extensive legal counseling provided them; legal representation at the hearings; reviews and appeals), and how this far exceeds rights accorded students at civilian colleges. Additionally, we discussed how internal cadet actions, such as Honor Committee hearings handled by the students themselves, differed.

I repeated to Rose that he was at liberty to see or have copies of all the Academy regulations relating to these matters, but he indicated that he thought he would be wasting his time unless he were able to see the individual case files pertaining to cadets who have been disenrolled. He said that the names of particular former cadets would not be used in his proposed paper, but that he wanted to set forth the facts of various cases, particularly honor violations, in footnotes. I advised him that, to my knowledge, the Cadet Honor Committee did not have verbatim or even summarized records of its proceedings, and the only "records" might be brief, one-page summarizations of each case which were provided only to the cadet honor representative from each of the forty cadet squadrons for internal purposes related to training and administration of the Honor Code by the cadets themselves. Moreover, I suggested to him that any records which might exist are very carefully restricted to use of cadets within the Cadet Wing, and it would amount to an invasion of the privacies of the cadets involved, such as those who have resigned after their fellow cadets found them to have cheated, lied or stolen, to disclose the details of their misconduct outside of the Cadet Wing. I then suggested that he take the matter up with the Commandant (B/Gen Galligan) or the Commandant's Executive for Honor and Ethics (Major Hart), but that first he might wish to discuss the Honor Committee functions with Major Lee, Tenure Associate Professor of Law, who serves as Legal Advisor to the Honor Committee. I introduced him to Major Lee, whose office adjoins mine, and I departed for a scheduled meeting.

I next heard from Rose by a letter dated 23 September 1971 (Atch 3), with which he enclosed a copy of a letter of the same date he sent to Major Hart. In his letter, he asked me to advise the "proper officers of the Commandant's office" to send him the "Honor Code Reading File." This I declined to do, for reasons which I believe had already been made abundantly clear to Rose.

The other two plaintiffs in this action, Charles P. Diamond and Lawrence B. Pedowitz, are unknown to me. To my knowledge, neither has ever made any request whatsoever for any files, records or other information at the United States Air Force Academy.

/s/ Marcos E. Kinevan
MARCOS E. KINEVAN, Colonel, USAF
United States Air Force Academy
Colorado

STATE OF COLORADO

COUNTY OF EL PASO

Subscribed and sworn to before me this 15 day of September 1972.

/s/ Beverly J. Ohm
BEVERLY J. OHM
Notary Public
For the State of Colorado

My commission expires 12 April 1975.

Box 4J
33 Washington Square West
New York, N.Y. 10003
21 Aug 71

Colonel Marcos E. Kinevan
Department of Law
USAF Academy, Colorado 80840

Dear Colonel Kinevan:

I am a 1969 Air Force Academy graduate, a New York University law student, and a staff member of the NYU *Law Review*. To graduate from New York University Law School I must write a publishable law note. Upon my suggestion, the Editorial Board of the NYU *Law Review* has invited me to write for publication therein a law note on what we perceive is an interesting topic about which little has been written: the administrative disciplinary systems of the five service academies. I wish to do so.

I wish to discuss in a paper the substantive and procedural due process aspects of the academies' administrative disciplinary systems. The paper would include specifically an analysis of the proceedings of the Air Force Academy's (1) Honor Committee; (2) Ethics Committee; (3) Commandant's Disciplinary Board; and (4) dismissal boards. My paper must be completely objective, factual, and unopinionated, and precisely accurate.

I cannot write the paper I propose unless the Academies' authorities are willing to assist me in obtaining the facts. Without wholehearted co-operation, efforts to write the paper would be futile. Moreover, I am a career Air Force officer looking forward to a rewarding future as an Air Force JAG, and would not write the paper unless I was certain the proper Air Force authorities in no way objected. Therefore, I am writing to you for two reasons: (1) to ascertain your feelings as to whether you or any other proper authorities would in any way object to a completely factual paper on my proposed topic, and (2) to ask for the assistance of the Academy's Department of Law and other authorities in getting the information I need.

Law school begins on 13 September. Before beginning the time consuming routine of daily classes I wish to complete most of the research for my note. Therefore, I wish to vist the Academy between 1 and 10 September to interview officers and cadets knowledgeable about the Academy's disciplinary and dismissal proceedings.

I wish to emphasize that I am seeking to write a completely factual, unopinionated paper. A law note not so written would be discounted by legal scholars, who demand precisely accurate and intellectually honest facts and analysis. My paper could make a significant contribution to the Academy and to the legal profession in this heretofore unexplored area of the law if written properly, as I have described.

Again, and above all, I do not wish to jeopardize in even the slightest degree, directly or indirectly, my opportunities as a career Air Force JAG. If there are any objections to my writing the paper, or guidelines you wish me to observe, please let me know. No one other than purely personal friends, some of them Academy graduates, and the Editorial Board of the *Law Review* knows I wish to write the paper, and no one else will know the informal guidelines you might give me.

Please let me know if the Department of Law and/or any other relevant authorities will assist me in obtaining the information I need for my paper if I should visit the Academy in a couple of weeks. It is impossible to write the paper without your assistance. If there are objections for some reason, I hope I will learn them now before exerting many further efforts. I am enthusiastic about publishing an explication for the legal profession on this "new" area of the law. I think the prospect of this paper is an opportunity to bring some favorable notoriety to the Academy in a major, well-respected legal journal. I sincerely hope you share my enthusiasm.

Respectfully,

/s/ Michael T. Rose
MICHAEL T. ROSE
1st Lt., USAF

DEPARTMENT OF THE AIR FORCE
Department of Law
USAF Academy Colorado

30 August 1971

1st Lt Michael T. Rose
New York University Law Review
249 Sullivan Street
New York, New York 10012

I am writing in reply to your 21 August letter requesting my opinion on the propriety of a proposed topic for a Law Review note and for assistance in obtaining certain facts for the note.

In your letter, you expressed some concern that your proposed note on the administrative disciplinary systems of the five service academies might in some way jeopardize your future as an Air Force Judge Advocate. I do not believe that authoring an accurate and objective legal analysis of a recognized segment of administrative law should give you any cause for concern. The specific administrative practices and procedures you speak of are subjects of Air Force or Academy Regulations, and as such are readily available to anyone. I feel sure that no one would be unduly concerned about fair comment or objective legal analysis of their contents.

Frankly, though, I would question the propriety of your topic in relation to its scope. I believe you will find it quite difficult, if not impossible, from both a time and space standpoint to even scratch the surface of so extensive and complex a topic. In fact, in my view, a thorough, scholarly and objective presentation could not be accomplished without devoting hundreds of hours to research and acquiring considerable experience in the actual functioning of the disciplinary systems at the service academies, and then, to adequately cover the subject, the product would have to be of almost book length. From my editorial experience on the Cal. Law Review, I am reasonably sure that this is not what

the NYC editors who approved your proposal have in mind. Anything resulting from much less effort would, I suspect, amount to . 'tle more than expository writing far short of law review standards and, regretably, might readily create wholly erroneous impressions on the part of readers.

Hence, if you are seeking a researchable topic within the limit, short and [illegible] available to you as a student intern of a service [illegible], I suggest that you consider narrowing the scope to a point that you might be able to explore and explain more thoroughly and accurately. In this connection, quite little has been published pertaining specifically to the service academy disciplinary systems (although a forthcoming issue of the Air Force JAG Law Review will have an article on that topic), much has been written on various aspects of "student rights" in general (e.g., see 54 Cal. L. Rev., vol. 1 (March 1966), or inquire of the National Association of College and University Attorneys, 635 Grove Street, Evanston, Illinois, for a bibliography of books and articles).

I am somewhat perplexed at your request for assistance. As I mentioned above, administrative discharge procedures for all types of cadet misconduct are defined by Air Force and Academy Regulations. These are readily available to anyone, under the provisions of the Freedom of Information Act and the administrative directives implementing it. The regulations set forth in detail the procedures in question and, for your purposes, should be adequate. The Director of Administration, USAFA, could advise you concerning the requirements for obtaining copies.

Apparently, however, you might have something else in mind, since in your letter you emphasize the necessity for Academy authorities to willingly assist and "wholeheartedly" cooperate with you "in obtaining the facts," although the pertinent regulations only set forth the procedures in question. What, if anything, Academy officials might add escapes me. But if your proposal extends to interviewing officials or researching confidential files, I believe your efforts might be better expended on some other topic. For one thing, no one here would be able to "assist" you, for the purposes indicated, unless you obtained clearance from SAFOI (Office of Information Secretary of the Air Force) before arriving. But even with such clearance, access to personal, confidential files relating to disciplinary actions or dismissals and the reasons therefor could not be granted.

For the several reasons I have mentioned, I regret that I am unable to personally share your enthusiasm for your proposed topic. Whether others, such as the Superintendent or Commandant, might view it differently is, of course, unknown to me.

Sincerely yours,

[signature]

HAROLD E. HEIVAN, Colonel, USAF
Professor and Head

BEST COPY AVAILABLE

NEW YORK UNIVERSITY LAW REVIEW
249 Sullivan Street
New York, N. Y. 10012

Box 4J
33 Washington Square West
New York, N.Y. 10011
23 Sep 71

Department of Law
USAF Academy, Colorado 80840
Attn: Colonel Kinevan

Dear Colonel Kinevan:

Enclosed is a copy of my latest request for assistance in researching my note. I hope you will find it appropriate to send me a copy of the Honor Code Reading File and that you will so advise the proper officers of the Commandant's Office. I really do need the information contained in the File and assure you that it will be used only in the manner I have described in the letter to Major Hart.

Thank you very much.

Respectfully,

/s/ Michael T. Rose
MICHAEL T. ROSE
1st Lt., USAF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL T. ROSE; CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW; LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFF

vs.

DEPATMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT T. CLARK, UNITED STATES AIR FORCE, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, UNITED STATES AIR FORCE, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, UNITED STATES AIR FORCE, DEFENDANTS

AFFIDAVIT OF RONALD E. WALLACE

1. My name is Ronald E. Wallace, Second Lieutenant, United States Air Force. I was the Chairman of the Cadet Honor Committee for Academic year 1971-72. As chairman I had the responsibility of supervising the administration of the Honor Code and insuring that the Cadet Wing is educated in the workings of the Honor Committee. I only sat as Chairman of Honor Hearings. When I became involved with Lieutenant Rose during the first semester of 1971-72 year, he came to me for an interview on the Honor Code. He stated that he was working on a paper concerning honor codes at other institutions. I knew that he was a graduate of the Academy and was attending law school at New York University. We had about a two hour conversation and I gave him some of the publications that I had on the Honor Code (i.e., honor reference manual, lesson plans, honor hearing procedures). We talked about several cases and he said he would like some example cases. It was my understanding, based on my conversation with him, that he was performing research in relation to the

Honor Code for a research paper he was preparing. It was based on this understanding that I permitted him to borrow my Honor Reading File or book of write-ups of old honor cases. This reading file contains all of the names of the cadets involved and when I sent him the cases I sent him a note stating that no names could be used. I further asked that he return the book of cases to me when he was finished. I believed that since he was an active duty officer and graduate of the Academy he would not use the cases in any manner other than for the purpose he specifically described to me.

2. I was informed by Major Hart on 17 December that I should write my statement about releasing the cases to the public. When I asked him why, he told me about the appeal that Lieutenant Rose had made. At this time I informed Major Hart of my dealings with Lieutenant Rose, and he informed me that I should not have sent the cases. I called Lieutenant Rose on the evening of the 17th of December to try to clarify what had happened. He stated that the day after he received the cases I sent he received a letter from Major Hart telling him that he could not use honor cases in his report. Lieutenant Rose stated to me on 17 December that he did not use the cases that I had sent and instead sent them back to me. He stated that if he had used them he would have been violating an order and instead he decided to appeal to the Secretary of the Air Force.

3. Lieutenant Rose has on one or two occasions during 1972 corresponded with me. He sent me a copy of the Honor Code he had drafted for New York University. I decided on my own to refrain from answering any more correspondence from Rose.

4. The Cadet Honor Committee follows Honor Operating Instruction dated 1 July 1970. Honor Operating Instruction #2 set forth the procedures to be utilized for honor cases. These procedures as well as other Honor Operating Instructions have been closely adhered to by the Honor Committees including the Honor Committees of which I was chairman. Paragraph 14 of Honor Operating Instruction #2, specifically provides, "The Chairman will

remind all cadets present at the hearing that all matters discussed in the hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative."

5. The effect of releasing honor cases to the public on the Honor Code is a very difficult question. An important fact, and perhaps the most important is that the Honor Code cannot be classified in the public's eye with any judicial system such as our courts. It is similar in some respects and quite different in a number of respects. The Honor Code which was instituted at the Academy by cadets is an ideal which is not fully comprehended and fully understood by the public. I feel that if any member of the public wants to know more about the honor system that he should not be prevented from doing so. I do not feel, however, that the Honor Code can be understood, taught, or judged by the reading of honor cases. It is very possible that this type of exposure of our honor system would be misleading and unjustly condemning for the Academy. There is much more involved in an honor case than can be written down in the brief of the case.

6. I feel that if the public gained the wrong understanding of the honor system, changes might be made that would render the Honor Code at the Academy as ineffective as many of the honor codes at civilian colleges and universities in our country. It is my personal opinion that this is not what the Cadet Wing wants to see happen to the Code that they swear to live by.

7. As Chairman of the Honor Committee, I felt a great deal of pride in the goals that our Honor Code hopes to attain. To have those goals lost to the intricacies of a strict judicial system would be a serious crime to both the cadets and the country. This, I feel, may happen as honor cases are misunderstood and misconstrued by the public. I am, therefore, opposed to the release of honor cases to the public. Confidentiality of ethics cases and proceedings is not established by any written operating procedure. However, the custom and practices within the Cadet Wing is to surround ethic cases with the cloak

of confidence. Ethics cases may include writing bad checks or some conduct that may indicate a lack of moral character and yet not constitute an honor violation. The conduct may be such that if published it could embarrass the entire Cadet Wing and for this reason the custom and practice has been not to release the cadet's name and to treat the circumstances surrounding the conduct in a very discreet manner.

8. Unlike honor cases the procedures for handling ethics cases are comparatively unstructured. Actual ethics cases are not necessarily written up or even summarized and therefore a regular file or record of actual ethic case summaries is not maintained. Only selective samples of typical ethics cases are maintained in the back of the Honor Code Reading File. In many instances ethic cases are handled informally within the Cadet Wing between the individual concerned, the Cadet Squadron Commander, and the Squadron Ethics Representative. The only time an ethic case is written up or summarized is where it is determined to be of value for the future education of the Cadet Wing.

9. I have not received any requests, correspondence, or contacts with the other plaintiffs in this suit.

/s/ Ronald E. Wallace
RONALD E. WALLACE

STATE OF ALABAMA

DALLAS COUNTY (SELMA)

Subscribed and sworn to before me this 19 day of September 1972.

/s/ [Illegible]
Notary Public
State of Alabama-At-Large
My Commission Expires June 4, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

vs.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT OF RODNEY W. WICKERS

Cadet First Class Rodney W. Wickers, being first duly sworn, deposes and says:

1. I am the Vice Chairman of the Cadet Honor Committee, USAF Academy, having been appointed to this position in April 1972. I have also acted as an Honor Representative for Cadet Squadron 20, the Air Force Cadet Wing since April 1971. I am aware of the procedures related to the administration of the Cadet Honor Code including all policies established. I have worked on the revision of the Honor Reference Handbook of the Air Force Cadet Wing during 1972; I have worked on honor lessons for the summer training of fourth class cadets; I have briefed various faculty departments and liaison officers; I am familiar with the Cadet Honor Code philosophy, the origin of the Code as well as the mission of the Code.

2. As long as I have been a member of the Cadet Wing it is my understanding that the procedure for briefing

members of the Cadet Wing by Squadron Representatives includes the admonition by the Honor Representatives that guilty cases are to be kept confidential within the Cadet Wing. After a cadet is found guilty by the Honor Committee and before it is published, discussions will only be allowed among cadets attending the honor hearing. These cadets may discuss the case with other cadets (for educational reasons) before publication only concerning basic facts of the case, but not to include the guilty cadet's name. The reason for this is that the cadet who is found guilty might elect not to resign and ask for a board of officers under AFR 11-1. The Squadron Honor Representatives may not brief their respective squadrons until the case is published and disseminated to the Cadet Wing. Upon official release by the Cadet Honor Committee of cadet honor cases, it is the custom and practice that such information will be held in strict confidence within the Cadet Wing. Once a brief is released to the Wing, honor representatives are permitted to discuss any aspect of the case with cadets, for their education, and Academy officers who have a need to know. Dissemination of the information via these briefs is through publication on squadron bulletin boards by covering the brief with a cover sheet which states "Honor Case Summary—For Official Use Only." The practice in publishing not guilty and discretion cases is precisely the same as guilty cases except the names are deleted. In guilty cases where official dissemination to the Wing is made, only the name of the guilty cadet is released. Names of other cadets who may have been involved are deleted.

/s/ Rodney W. Wickers
RODNEY W. WICKERS

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 14th day of June 1972.

/s/ Beverly J. Ohm
BEVERLY J. OHM,
Notary Public
My commission expires 12 April 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

vs.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT OF ALBERT P. CLARK

Lieutenant General Albert P. Clark, USAF, being first duly sworn, deposes and says:

1. I am the Superintendent of the United States Air Force Academy, having been appointed to this position in August of 1970. I am a 1936 graduate of the United States Military Academy, West Point, New York. Prior to my appointment as Superintendent and except for a period of three years during which I was a prisoner of war during World War II, I have served almost continuously in command and staff positions in the United States Air Force. The mission of the United States Air Force Academy is to provide instruction and experience to each cadet so that he graduates with the knowledge and character essential for leadership and motivation to become a career officer in the United States Air Force. As Superintendent I am responsible for the government of the United States Air Force Academy (10 U.S.C. 9334).

2. I am familiar with the Cadet Honor Code of the Air Force Cadet Wing. The Cadet Honor Code provides "we

will not lie, steal, or cheat, nor tolerate among us anyone who does." To the members of the Cadet Wing the Cadet Honor Code means the pride of knowing one's word is trusted implicitly. It means the respect one has for the property of others and the consideration one expects others to have for his property. It means the responsibility to expect credit only for one's own personal achievement. It means the moral courage to protect the Wing from any cadet who places his standards below those of the Wing's Honor Code. The Code embodies the attitude of every cadet who has zealously guarded its existence since it was first established by the Class of 1959. Cadets find that living by the Honor Code is not so difficult as living without it. The Cadet Wing expects each cadet to make the Cadet Honor Code a part of his personal code throughout his life. The young Air Force officer needs to be able to trust his men as does any commander. In these times of expensive and increasingly complex weapon systems, the officer must rely on fellow officers and airmen for his own safety and the safety of his men. By living honorably while a cadet, it is hoped that such conduct will become second nature and follow the individual throughout his career. The Honor Code is another important aspect of the training that a cadet gets at the Academy; however, in this case the Cadet Wing has set its own standards. The Honor Code was originated by the first class to enter the United States Air Force Academy. They studied the Honor Code and systems then used by institutions throughout the country, including the United States Military and Naval Academies, Virginia Military Institute and others. These were screened, formulated, and organized into a system and basic code which was presented to the Cadet Wing in 1955 by the first Commandant of Cadets. It was accepted by the Class of 1959 and subsequently administered, interpreted and cultivated by them and their successors. The Honor Code has always belonged to the Cadet Wing which administers and instructs the Code through its honor committee with the advice and counsel of the Commandant of Cadets. It is the duty of the Cadet Wing to insure that the Code never becomes stagnant or unrealistic.

Every cadet feels responsible for the vitality and effectiveness of the Code. In sum, the final mission of the Cadet Honor Code is to influence cadets to live honorably, so they will graduate as officers with highest standards of individual honor and integrity.

3. I am aware of both the provisions of the Freedom of Information Act and the Department of the Air Force Regulation 12-30 which provide that an individual's personal record may be exempt from disclosure since the release of the record would constitute an unwarranted invasion of the personal privacy of the individual. Some cases may be recognized by the reader from the circumstances alone, even though the identity of the cadet is not given. This being the case, the reader could easily connect the incident with the particular cadet involved.

4. I am informed that Plaintiff Rose is performing research for an article entitled "Disciplinary Systems at the Service Academies." The Cadet Honor Code is not an instrument of the United States Air Force or the United States Air Force Academy disciplinary system. The Honor Code operates entirely under the authority of the Cadet Wing. Eight firstclassmen selected by their classmates from among the 40 Honor Code Representatives (one from each of the 40 squadrons) represent their constituents in the Wing. This committee alone determines the guilt or innocence of the cadet accused of a breach of the Honor Code. If the goal of the Honor Code were to enforce the lowest standards of conduct tolerated by our military community, i.e. the punitive articles of the Uniform Code of Military Justice or Air Force regulations, its operation might be of interest to law stduents and other concerned members of the public. However, this is not the purpose of the Cadet Honor Code. The Honor Code embodies the attitude of members of the Wing. Its mission encompasses a certain kind of intangible strictures of conduct, i.e. moral courage to protect the Wing from any cadet who places his standards apart from those of the Wing's Honor Code. To make the public privy to the internal workings of the Honor Code

for analysis, adjudication or critique would seriously detract from its purpose and weaken its effectiveness. At the same time it is difficult to foresee that failure to release this information would adversely affect any member of the public.

5. The study of graduate resignations requested by Plaintiff Rose should also be exempt from disclosure. This study was drafted by the Air Force Academy in the Office of the Alumni Secretary who is assigned to the Academy under military orders. Plaintiff Rose did receive a copy of an analysis of the study which is the only part of the study released to graduates. Portions of the study were devised from questionnaires which called for frank responses from Academy graduates. These responses were made with the implied understanding that they would be treated discretely and that their use would be limited to remedying or improving situations which brought on these resignations. Publication of material from the study would seriously hamper further studies and definitely curtail frank responses to questions which often were quite critical to the development of further methods of retaining Academy graduates as career officers in the United States Air Force. The fact that Captain Frederick L. Metcalf, the Alumni Secretary, previously indicated in a publication, over three years ago, that the complete study would be available to a limited group of graduates should not be determinative of whether the information is releasable. As a matter of fact the information has not been released to graduates or to the public for over a year. It is not the intention of the United States Air Force Academy in denying these studies to keep the public uninformed, but rather to protect the private lives of former Air Force cadets. The various studies were compiled to self-evaluate what the Academy could do for its graduates and what areas should be strengthened to serve the mission of the United States Air Force Academy. Further release of these internal Air Force communications would adversely affect the validity of the studies because in the future graduates would be less frank in their re-

sponses if they knew their opinions might undergo scrutiny by members of the public.

/s/ Albert P. Clark
ALBERT P. CLARK

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 5th day of June 1972.

/s/ Beverly J. Ohm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

vs.

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT OF WALTER T. GALLIGAN

Brigadier General Walter T. Galligan, USAF, being first duly sworn, deposes and says:

1. I am the Commandant of Cadets, United States Air Force Academy, having been appointed to this position in February 1971. I am a 1945 graduate of the United States Military Academy, West Point, New York. Prior to my appointment as Commandant of Cadets at the United States Air Force Academy, I have served almost continuously in command and staff positions in the United States Air Force. As Commandant of Cadets I am responsible to the Superintendent for the discipline and military training of members of the Cadet Wing. I am primarily responsible for providing advice and counsel to the Honor Committee of the Air Force Cadet Wing.

2. Honor Codes and Systems which were used by other colleges and institutions in the United States were examined by a study group appointed by the first Academy

Superintendent, Lieutenant General H. R. Harmon. These were screened and formulated, and organized into a system and basic code which was presented to the Cadet Wing by the first Commandant of Cadets. It was accepted by the Class of 1959 and subsequently administered, interpreted and cultivated by them and their successors. The Honor Code has always belonged to the Cadet Wing which administers and instructs the Code. The Code is realistic and reasonable. Each cadet realizes that the standards that are expected of him are minimal and that he should maintain a set of personal values higher and broader than those established by the Honor Code. The Honor Code is analogous to a foundation upon which the cadet seeks to build his own integrity. He is always seeking to improve what he had been before. These standards of conduct apply anytime, any place and in any situation. By making the Code all encompassing, cadets have established a true standard that is more than a mere formality to be observed occasionally. Honorable conduct must be a continuous pattern of behavior. The purpose of the Cadet Honor Code is to build within the man a keen sense of honor and an intense dedication to live by the dictates of this sense of honor. The man who fails in this is deemed unworthy of cadet status and is asked to resign from the Academy. The Honor Code followed by the Air Force Cadet Wing at the United States Air Force Academy is different in both interpretation and in its administration from honor codes and systems followed at other colleges and institutions in the United States. For example, the toleration clause, which is an integral part of the Honor Code of the Air Force Cadet Wing, is seldom found in other honor systems. The toleration clause is the backbone of the Cadet Honor Code. It requires that every cadet report any suspected violation of the Code. Toleration cannot be presented until the intent to ignore the honor violation is formulated. In some cases, several hours or days of thinking may be necessary before the decision is finally made to turn in or not to turn in the suspected honor violator. During this period the cadet is encouraged to talk with

someone whom he respects, for example an Honor Representative, a chaplain, or some other officer. Toleration can only occur when the conclusion is made not to turn in the suspected cadet. Each cadet fully understands the spirit behind the toleration clause, as well as the obligation it creates and the method of reporting a suspected honor violation.

3. I am aware of both the provisions of the Freedom of Information Act and the Department of Air Force Regulation 12-30, which provide that an individual's personal records may be exempt from disclosure since the release of such records would constitute an unwarranted invasion of the personal privacy of the individual. The case summaries of the United States Air Force Academy on Honor and Ethics Hearings should be exempt from disclosure. The use of these case files or write-ups, even if the identity of the individual were not given, could still be an invasion of privacy as the incident may have been so notorious that the reader would immediately recognize the cadet who was the subject of the Honor or Ethics Hearing. In certain instances, the Cadet Wing has given the Honor Committee the prerogative to grant discretion to a cadet who has been voted guilty and to allow him to return to the Cadet Wing. The man who has learned his life-long lesson of honor can be a great asset to the Wing and to the Air Force. His retention is therefore not only justified; it is desired. Use of discretion is reserved for very special cases. It is through the highly selective use of this clause that the Cadet Wing is able to retain a truly honorable man. It is well understood, however, that the circumstances surrounding an Honor Code violation are between the cadet and the Cadet Honor Committee. Therefore, every effort is made to avoid disclosure of the cadet's name so that he may return to the Wing unblemished to continue his education. To permit release of case summaries or write-ups of either Honor or Ethics incidents even though not notorious could reach his home town or his friends and become an indelible blot on his future.

4. On 6 January 1972 I denied Plaintiff Rose's appeal for disclosure of Ethics case summaries and write-ups. In this letter I explained that these sample write-up cases were for the use and edification of the Cadet Wing and Academy staff only. I further indicated that indiscriminate release of this information to persons without a need-to-know could be counter to the best interests of the individual concerned and to the United States Air Force Academy. These case summaries and records are not handled indiscriminately at the United States Air Force Academy. The sole purpose in providing copies to the Cadet Squadrons, Faculty Departments and Mission Elements is to provide guidance and instruction, e.g. to the classroom instructor, concerning Cadet Wing interpretation of the Code. Other staff agencies at the United States Air Force Academy receive copies only on a need-to-know basis. Release is limited. Notwithstanding the fact that members of the Honor Committee had privately released copies of honor case summaries to Plaintiff Rose, this is not the determinative of the release of information contained in official records. At the time I signed this correspondence addressed to Plaintiff Rose, I was informed and believed to be true the fact that Plaintiff Rose was fully aware and clearly informed of the provisions of the Freedom of Information Act and his rights to appeal thereunder. The reason for this is that in addition to being a United States Air Force Academy graduate he had had considerable correspondence and conversations with members of my staff and other responsible officials at the United States Air Force Academy.

/s/ Walter T. Galligan
WALTER T. GALLIGAN

STATE OF COLORADO)
)
COUNTY OF EL PASO)

Subscribed and sworn to before me this 5th day of June 1972.

/s/ Beverly J. Ohm

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605

MICHAEL T. ROSE, CHARLES P. DIAMOND, EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, LAWRENCE B. PEDOWITZ, FORMER EDITOR-IN-CHIEF, NEW YORK UNIVERSITY LAW REVIEW, PLAINTIFFS

—against—

DEPARTMENT OF THE AIR FORCE, ROBERT C. SEAMENS, JR., SECRETARY OF THE AIR FORCE, LIEUTENANT GENERAL ALBERT P. CLARK, USAF, SUPERINTENDENT OF THE UNITED STATES AIR FORCE ACADEMY, BRIGADIER GENERAL WALTER T. GALLIGAN, USAF, COMMANDANT OF CADETS, UNITED STATES AIR FORCE ACADEMY, MAJOR CHARLES E. HART, USAF, DEFENDANTS

AFFIDAVIT

CITY OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL T. ROSE being duly sworn deposes and says:

1. I am a plaintiff in this action, a third-year student at the New York University Law School and an editor of the New York University Law Review ("the *Review*"). I graduated from the United States Air Force Academy in June, 1969 with a Bachelor of Science degree. I am a Captain in the United States Air Force, on leave from the military service to attend law school. I submit this affidavit in support of plaintiffs' cross-motion for Summary Judgment in this action.

2. I, in conjunction with other members of the *Review* and other students at the New York University Law School, am conducting a study of disciplinary systems at the five service academies. This study, tentatively entitled "The Administrative Adjudicatory Systems of the Service Academies: Constitutional Powers and Limitations" is scheduled for publication in a forthcoming number of the *Review*.

3. In June, 1971 I began my research into disciplinary systems at the service academies in connection with my regular course work. When I joined the staff of the *Review* in August, 1971 I decided to expand my research into a more comprehensive analysis of the conduct, honor and ethics systems at each of our five service academies. At the time this decision was made, officers of the *Review* informed me that, because of the timeliness and importance of my project, I would be granted leave from my full-time Law Review duties as well as financial assistance from the *Review* in order to devote substantially all of my time to my research.

4. During the course of my research, I have visited each of the service academies twice and have interviewed numerous cadets, former cadets, officers, faculty and staff concerning disciplinary procedures and particularly the implementation of honor and ethics codes. In addition, I have corresponded extensively with these individuals, with members of the various Armed Services and with civilian personnel connected with Service agencies who are knowledgeable about, or involved in, the administration of the service academies.

5. As my research has progressed and as the information which I have been gathering has proved to be of significant interest to the *Review*, the scope of my project has expanded. This past summer I have worked full-time on this study with the assistance of additional financial aid from the *Review* and grants from The Norman Foundation and from private sources. With the help of these grants, I employed four summer students to assist with my research. During the course of this research each of the Service Academies was visited and, in addition, I have visited each of the services' Officers Candidate Schools and a number of public and private universities which have honor or ethics codes.

6. This study which, in early draft form already exceeds one hundred pages, is, to my knowledge, the

first systematic, in-depth study of the conduct, Honor and Ethics systems at our Service Academies. The information I am seeking in this action is crucial to the completion and success of this study.

7. The editors of the *Review*, in accordance with applicable scholarly standards, demand that the factual premises for each assumption I make in my article be fully documented. It is for this reason that I am seeking access to the Air Force Academy's Honor and Ethics Code case files and the complete study of graduate resignations from the Air Force.

8. The Honor and Ethics code case summaries will enable me to document the substantive content given ot the honor code's injunction against "lying", "stealing" and "cheating". This content has developed over the life of the code through case by case adjudication of code violations. I am seeking access to these case files solely for this purpose.

9. Access to the complete study of graduate resignations will enable me to document my hypotheses concerning the impact of the codes on the role perceptions of Academy graduate officers. In his letter to me of September 29, 1972 Captain Metcalf stated that among the most important factors influencing graduate resignations was a "sense of lack of integrity in the Air Force." (Comp. Ex. "A"). The complete study of graduate resignations will assist me in determining the effects, if any, the Honor and Ethics codes might have had on views in this area.

10. In September 1971, I requested copies of the Academy's Honor Code case files and in October 1971 of the Academy's Ethics Code case files. I requested a copy of the complete study of graduate resignations after I received the letter of September 29, 1969 from Captain Frederick L. Metcalf, informing me that the complete study would be sent to me on request.

11. On October 15, 1971 Major Charles Hart denied me access to the Academy's Honor Case files. By letter dated January 6, 1971 General Galligan denied me access to the Academy's Ethics Case files. On October 29, 1971 Captain Metcalf denied my request for a

complete copy of the Academy's study of graduate resignations.

12. After I was denied this information, I, along with Lawrence B. Pedowitz, who at that time was Editor-in-Chief of New York University Law Review, appealed the denial of this information to the Secretary of the Air Force. Our appeal of the denial of the honor case files and the complete study of graduate resignations was by letter dated November 29, 1971. On or about January 5, 1972 I appealed to the Department of the Air Force the denial of the ethics case files. I was joined in the January appeal and the November appeal, by Mr. Pedowitz acting on behalf of the *Review*. (In March, 1972 Charles P. Diamond succeeded Mr. Pedowitz as Editor-in-Chief of the *Review*.) In order to promptly obtain the information which we were seeking, Mr. Pedowitz did not make a new request for this information inasmuch as the Air Force's position that the information we were seeking was exempt from disclosure, as a matter of law, indicated that such a request would be pointless. By letter dated February 14, 1972, Thomas W. Nelson, the Administrative Assistant to the Secretary of the Air Force, notified both Mr. Pedowitz and myself that our appeal from the Air Force Academy's refusal to produce the information we were seeking had been denied.

13. I wish to emphasize that in seeking these three items of information, I have no interest whatsoever in learning the identity of any individual who may have been involved in Honor or Ethics code violations, or in learning the identity of any graduate of the Academy who provided information for the study of graduate resignations. I do not intend to use any information in the documents I am seeking in order to ascertain from other sources the identity of individuals who may have been involved in Honor or Ethics code cases nor do I intend to contact or interview any such cadet or former cadet.

14. I am seeking the Honor and Ethics code case files solely to document for the *Review* the types of acts which have been deemed Honor and Ethics code viola-

tions. I have requested a complete copy of the graduate resignation study for the reasons stated in paragraph 9 of this affidavit.

/s/ Michael T. Rose
Michael T. Rose

Sworn to before me this 18th day of October, 1972.

/s/ Terrence A. Gallagher
TERRENCE A. GALLAGHER
Notary Public, State of New York
No. 24-1363320
Qualified in Kings County
Commission Expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1605 LFM

[Filed 1/5/73]

MICHAEL T. ROSE, ET AL., PLAINTIFFS

—against—

DEPARTMENT OF THE AIR FORCE, ET AL., DEFENDANTS

ORDER

A motion having been filed on September 29, 1972 by all defendants herein, seeking summary judgment and dismissal, and the time for plaintiffs to respond thereto having been adjourned until October 27, 1972, and plaintiffs having noticed a cross-motion for summary judgment on October 18, 1972, also returnable October 27, 1972, and both motions having been submitted to the Honorable Lloyd F. MacMahon U.S.D.J., and the Court having been fully advised in the premises, and it having filed its Memorandum Opinion on December 19, 1972, it is hereby

ORDERED, ADJUDGED AND DECREED as follows: The defendants' motion for summary judgment is granted insofar as it exempts the Honor and Ethics Code case summaries from disclosure, and is denied in all other respects. Plaintiffs' cross-motion for summary judgment is granted insofar as it seeks to require the Air Force to disclose the complete study on graduate resignations with comments and is denied in all other respects.

Dated: New York, New York
January 3, 1973

/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

Judgment Entered 1/5/73

/s/ John Livingston
Clerk

48 WALL STREET
New York, N.Y. 10005

[Received Jan. 11, 1974, Appellate Section,
Civil Division]

January 7, 1974

Honorable Paul R. Hays,
Honorable Wilfred Feinberg,
Honorable Leonard P. Moore,
United States Court of Appeals
for the Second Circuit,
United States Court House,
Foley Square,
New York, New York 10007

Re: Rose, et al v. Department of the Air Force No. 73-1246

Your Honors:

By letter dated December 26, 1973, we were advised by the Clerk of the Court that the panel who heard argument in the above captioned appeal had requested appellants' views as to whether the appeal is, or is about to become, moot by virtue of a New York Times article dated December 16, 1973 relating to the study of discipline at the service academies by Captain Michael Rose and members of the New York University Law Review.

For the reasons discussed below appellants believe that the appeal is not, and is not about to become, moot. On the contrary, we maintain that recent developments have reinforced the importance to the public of the documents sought and have underscored the desirability of correcting the Air Force Academy's refusal to permit even carefully limited and judicially controlled access to the Honor and Ethics case summaries.

Captain Rose has informed me that the publication schedule of the article is such that if access to the documents is provided prior to the end of January, he believes that the information can be included in the article in the form and for the purposes originally

contemplated, *i.e.*, to set forth and document the substantive content given the Code's prohibitions against lying, cheating, stealing and tolerating.

Captain Rose feels that if the information sought is available only after publication, it would still be of vital importance to the study. Pursuant to an arrangement with the New York University Law Library, all empirical primary source material which has been and will be assembled in connection with the preparation of the article, including the Honor and Ethics case summaries, will be maintained for public inspection at the New York University Law School Library. The article itself will state that such information is available for the inspection of interested persons. If the case summaries are available after publication, they will be included with the other source material on file at the Library, and will be available to substantiate one of the articles most important conclusions.

Captain Rose has also informed me that as knowledge of the impending publication of his study has spread, he has received numerous requests for copies of the study and for access to the information on which the study is based. Such requests have been received from governmental agencies and officials concerned with the military and the service academies including the office of Senator Proxmire, Senator Ervin's Constitutional Rights Subcommittee, Congressman Michael Harrington (D. Mass.)*, the Joint Economic Subcommittee on the Government Operations Committee and the General Accounting Office (which Captain Rose informs me is studying the causes of abnormally high attrition at the Air Force Academy). Captain Rose has also received numerous inquiries from the media concerning his study and has been invited to publicly discuss his article and his findings. For example, he is scheduled to participate along with the Hon. Melvin Laird and the Hon. Robert McNamara in a seminar on military affairs conducted under the auspices of Brown University.

---

* Captain Rose has informed me that Congressman Harrington has seen the study in draft form and intends to insert the entire completed article in the Congressional Record.

Because of the controversial nature of his proposed findings concerning the Air Force Academy's Honor and Ethics Codes, Captain Rose feels that access to the first-hand documentation for those findings is essential to a proper response to the inquiries he has received, to a proper presentation of his findings and to a reasoned and informed defense of those findings against challenges to their accuracy.

In addition to appellants' continuing interest in the documents, the appeal is not moot for an additional reason. Under subsection (3) of the Freedom of Information Act ("FOIA"), non-exempt documents are to be made available to *any person*. Thus, the reasons for which documents may be sought, or the uses to which they are to be put, should have no bearing on their availability under the Act.

The House Report, states:

> "In place of the negative approach of the present law which permits only persons properly and directly concerned to have access to official records if the records are not held confidential for good cause found, subsection (c) of S. 1160 establishes the basic principle of a public records law by making the records available to any person."
>
> *U.S. Code Cong. and Ad. News Service* 89th Cong. 2nd. Sess. (1966) p. 2426.

Professor Davis states that the legislative history of the FOIA emphasizes "that required disclosure under the Act can never depend upon the interest or lack of interest of the party seeking disclosure. . . ." Davis, *Administrative Law Treatise*, p. 120 (1970 Supp.).

For the foregoing reasons, appellants do not believe that the appeal is moot and urge that it be considered on its merits.

Respectfully,

/s/ Barrington D. Parker, Jr.
Barrington D. Parker, Jr.
Attorneys for Appellants

cc: Hon. Paul J. Curran
Hon. Irving Jaffe
Leonard Schaitman, Esq.
John H. F. Shuttuck, Esq.

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

[SEAL]

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11 Jan 1974

Honorable Paul R. Hays,
Honorable Wilfred Feinberg,
Honorable Leonard P. Moore,
United States Court of Appeals
for the Second Circuit
United States Court House
Foley Square
New York, New York 10007

Re: Michael T. Rose v. Department of the Air Force, et al., (C.A. 2, No. 73-1264).

Your Honors:

This is to acknowledge receipt of Mr. Fusaro's letter of December 26, 1973, regarding the above-captioned case and enclosing therewith the New York Times article describing the soon-to-be published article of appellant Rose. This letter will present the Department of the Air Force's view that the appeal in this case is not moot.

First, it is clear that appellants' request for the Honor Code and Ethic Code case summaries is still outstanding and appellants in their January 7, 1974 letter also allege a continuing need. At the same time, the appellees still contend that these case summaries are exempt from disclosure under the Freedom of Information Act. Thus, there still exists a justiciable case and controversy which requires adjudication by this Court.

Furthermore, as we have emphasized in our brief (pp. 18-20, 26 [fn. 9], 36) continued confidentiality of the honor and ethic case summaries is absolutely essential

to ensure the proper functioning of the Honor and Ethics Codes. The filing of this lawsuit has raised the threat that these case summaries might be disclosed to the public. To ensure the continued proper operation of the Honor and Ethics Codes, a definitive judicial determination that the case summaries are exempt from disclosure is essential.

The letter of January 7, 1974 from appellants' counsel itself furnishes the most cogent of reasons why these case summaries are exempt under the Act. Appellants plan to place the case summaries on public file at the NYU law library. Any curiosity seeker would thus have access to the confidential and intimate details of a cadet's past indiscretions. A more blatant and unwarranted invasion of an individual's personal privacy is hard to imagine.

Respectfully,

/s/ Leonard Schaitman
LEONARD SCHAITMAN

/s/ Donald Etra
DONALD ETRA
Attorneys for the Appellees
Department of Justice
Washington, D.C. 20530

cc: Barrington D. Parker, Jr., Esquire
48 Wall Street
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American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10010

FOR IMMEDIATE RELEASE NOVEMBER 10, 1972

Office of the White House Press Secretary
(Key Biscayne, Florida)

THE WHITE HOUSE

The President has received the April 1972 Report of the Board of Visitors to the United States Air Force Academy. The Board, which met at Colorado Springs, Colorado, on April 20-23, 1972, is required by law to meet annually to inquire into the state of morale and discipline, the curriculum, instruction, physical equipment, financial affairs, academic methods and other matters relating to the Academy which the Board decides to consider and report its findings to the President.

The Board consists of six Presidential appointees, three Vice Presidential appointees, four appointed by the Speaker of the House and a member designated by the Chairman of the Armed Services Committee from each Congressional body.

The Board reached the following conclusions:

1. The Cadet Honor Code is a viable working part of cadet life and the Board endorses the manner in which it is being administered.

2. The Board is pleased to note that discussions on honor systems between cadets and midshipmen of the various Service Academies have taken place in the past and are planned to continue in the future.

3. The Board is pleased to note the outstanding academic accomplishments of the Class of 1972 and congratulates the cadets and the Academy faculty for the academic excellence these achievements represent.

4. Brigadier General William T. Woodyard, Academy Dean of Faculty, has consistently demonstrated strength of leadership in maintaining an academic program which is of proven excellence and consistent with the overall mission of the Academy and he is singled out for special recognition by the Board.

5. The Board is encouraged to note that the number of applicants for the Academy is increasing, not decreasing.

6. The Academy is being capably and effectively administered by the Superintendent, Lieutenant General Albert P. Clark, and his key staff members, Brigadier General William T. Woodyard, Dean of Faculty, Brigadier General Walter T. Galligan, Commandant of Cadets, and Colonel Francis E. Merritt, Director of Athletics. The Board is of the opinion that these officers provide the excellence of leadership needed to accomplish the Academy's mission.

The Board made the following recommendations and took the following positions:

1. That permanent recognition be given to the late General Emmett O'Donnell, Jr.'s service on the Board of Visitors, by acknowledging its value to the Academy, the Air Force and the entire Nation by naming the Academy Airstrip or a suitable permanent building at the Academy in his honor.

2. That caution be exercised against Honor Code procedures which can result in arriving at judgments before the facts are heard and that the Cadet Wing continue to be watchful to insure that the individual rights of cadets undergoing investigation under the Honor Code be scrupulously protected.

3. That the Academy be encouraged to take steps to publicize the positive features of the role of the Honor Code in the daily activities of the Cadets.

4. That the legislative proposal, S. 3188 and H.R. 14534 which would give an additional $250 per month to permanent professors upon completion of 31 years of service, is endorsed.

5. That the Air Force review the needs for Section 9334(b), Title 10, U.S.C. which limits the exercising of command to the academic department of the Academy for permanent professors and the registrar, and submit a request for legislation if it is concluded that there is sufficient justification to do so.

6. That the construction program (estimated cost of $2.4 million) proposed by the Academy to provide additional storage facilities and adequate runways at the Academy airstrip is again endorsed and that its early approval and completion be urged.

7. That continued and perhaps increased effort will be necessary to maintain a desirable candidate level.

8. That the Academy Registrar develop a model of suggested procedures and deadline dates to be sent to all Congressional offices for their guidance in their selection and submission of nominees. This model should be sent as soon as possible and updated on an annual basis for each nomination cycle.

9. That the Air Force be prepared to comply if the amendment to the Constitution to provide equal rights for women is ratified and that planning for the admission of women be based on the premise that existing admission and graduation standards be maintained.

10. That additional corrective action be initiated to rectify the problem of inadequate lighting in the old cadet dormitory, Vandenberg Hall, and endorses the expenditure of an estimated cost of $250,000 to raise the level of lighting to the standards of the New Dormitory.

The Board was composed of the following members:

Representative John J. Flynt, Jr., Georgia—Chairman

Senator Gordon L. Allott, Colorado
Senator Ted Stevens, Alaska

Representative James D. McKevitt, Colorado
Representative Charles H. Wilson, California

Mr. Kenneth H. Dahlberg, Chairman of the Board, Dahlberg Electronics, Golden Valley, Minnesota
Lieutenant General Benjamin O. Davis, Jr., USAF (Retired), Director of Civilian Security, Department of Transportation
The Very Reverend Frank R. Haig, S.J., President of Wheeling College, Wheeling, West Virginia
Mr. James M. Reynolds, President, Reynolds Printasign, Pacoima, California
Mr. Gordon H. Scherer, Attorney at Law, Cincinnati, Ohio

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UNCLAS OI SECTION 1 OF 3.

Following is transcript of press conf of honor violations at USAF Academy, 1922 Hrs, 23 Jan 72:

Col Ragen: Good evening, gentlemen. I'm Col Art Ragen, Director of Information here at the Air Force Academy. I would ask that when we commence the press conference that you identify yourself when asking your question. I will introduce General Clark and he, in turn, will introduce the other members of the panel and then after a few remarks he will have the panel as well as himself open for questions. Ladies and gentlement, Lt General Albert P. Clark, Superintendent of the Air Force Academy.

Gen Clark: Good evening ladies and gentlemen. Your interest and that indeed of the entire nation on the incident which I reported today is of course understandable, the nation is entitled to the highest standards of integrity from among those young men who are here at the Academy training to positions of

PAGE 2 RUWTRFA40401 UNCLAS

great trust in your Air Force in the days ahead. Now, I'd like to introduce members of the panel here. We have the Commandant of Cadets, Gen Galligan, the Dean of the Faculty, Gen Woodyard, the Cadet Wing Commander, Cadet Charles M. Hardman and the Chairman of the Cadet Honor Committee, Cadet Ronald E. Wallace. You have my statement that I issued earlier today and I am sure you will be interested in some amplification. I would, however, remind all that our investigations are

incomplete and none of us would want to do anything that would in any way bias complicate or compromise the results of this investigation. The incident which we reported to you today is reminicient of several incidents that have occurred in the history of the Academy, one in 1965 and one in 1967. As painful as these incidents were and are, those in 65 and 67 clearly validated the efficiency of our Honor Code to the cadet and made quite clear that the vast overwhelming majority of cadets wishes to live under that Code. We would be happy to entertain questions that you may wish to ask in amplication of my statement today.

Fred Hobbs: KLZ can you give us the scope of this particular incident? Number of cadets involved?

C: Yes at the moment including names of possible implicated cadets or cadets who are witnesses, we are having a working list of approximately 75 names. This does not necessarily mean that there are 75 cadets guilty of

PAGE 3RUWTRFA0401 UNCLAS

a breach of the Honor Code, but we have to work through and investigate carefully all leads before we will know what we've got. At the moment there are approximately 23 who are seriously implicated by the evidence against them.

Hal Kennedy—KKTV, CS is there any indication in the instance of cadets selling the examination information?

C: I'v seen none and none has been reported to me but this does not mean that some of the evidence of this nature might not emerge before investigation is finished.

Gary Barkley, KSSS, CS: Could you briefly summarize whats happened since it's come to your attention? Sequence of events:

C: Yes, but I think I would like to defer the answer to that question to the Commandant of Cadets.

G: Starting at approximately 1700 yesterday when Mr. Hardman, Mr. Wallace and several members of Mr. Hardman's staff and Mr. Wallace's staff were surveilling an individual who had been suspected of petty theft—this case started developing later on during the evening the individual in question was confronted by the cadets and interrogated referencing this petty theft. He broke down and started indicating that this was just a piece of the action and the Honor Committee would be more than interested in knowing everything he

PAGE 4 RUWTRFA40401 UNCLAS

knew about discrepancies in the Honor System. At this time Mr. Hardman and Mr. Wallace enlisted some assistance of additional Honor Representatives and Squadron Commanders and their investigation continued throughout the evening and has actually been continuing all day. Neither one of them has been to bed since approximately two nights ago.

Hal Kennedy: Sir, was there not a case last week involving a cadet being found in his room with an examination paper?

C: Yes, and I would like to remind you we do have isolated honor cases every year. As a matter of fact, the average number of cases found in the last several years has been between twenty and thirty cadets. There was in fact a case last week I'm not sure I know the thrust of your question.

Hal: When General Galligan mentioned that it had started yesterday my question was—was what happened yesterday not connected with what happened last week, or don't you know that yet.

C: Yes, I think there is a connection, but we didn't know that last week.

KLZ: General Clark can you characterize for us the exact nature of the code violations of these particular cadets?

C: The nature of the violations you say? Most of them are academic cheating there are one of two cases we feel are stealing from fellow cadets.

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KLZ: What form did the academic cheating take?

C: Sharing information of a written examination in advance of the examination so that the cadet who gave the information and he who received it are both guilty of violation of the Code.

Jim Gibney, Denver Post: Is this confined to any one class or does it cut across the four classes?

C: To date the majority of cases appear to fall in the second class. They are spread through several squadrons and there appears to be no direct pattern involving athletes per se, although there are a few members of one of the athletic teams involved, not football.

KLZ: There are no football players?

C: Not at the moment and to my knowledge none have emerged as possible implicated cadets.

Loy Holman, Rock Mtn News, Denver: Have there been any resignations at all?

C: Well, all of these cases where the honor violation is confirmed, will result in a resignation.

Loy Holman: But there have been none so far?

C: I would have to verify that.

Hardman—Yes sir, we have sixteen.

PAGE 6 RUWTRFA0401 UNCLAS

C. Yes, we have sixteen to date. To this moment, I should say, because they have all emerged in the last twenty four hours.

KLZ: General, does there appear to be a ringleader, and can you name him?

C: Not to my knowledge, and if there were, of course, I could not name him at this time.

KROD: TV, CS: General Clark, is there any punitive action other than the resignation expected in this?

C: Not as a rule. In some serious cases it is conceivable that violation of this sort might result: for example, stealing, embezzlement or things of this sort could result in a court martial. But the typical honor violation case results in a resignation.

KLZ: General, since there appear to be repeated cases of violations—this is the third or fourth one on a fairly large scale—is there any indication at all that the honor code is not working, perhaps should be modified or dropped?

C: Not at all. As a matter of fact, we would be a great deal more worried if these things didn't surface. The cadets have themselves discovered these cases and the cadet system—the Cadet Commander and his staff and the Honor Committee are pursuing investigations themselves. This, I think we and the nation should be very proud of, that these lads are living under it.

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THEIR OWN SYSTEM AND MAINTAINING
THE STANDARDS.

AP: General Clark, could you review for us the difference in the Honor Code here and at West Point?

C: I'm sorry, I can't. But they are very similar.

KSSS: General Clark, could you possibly refer this question to one of the cadets. Sitting. What is the attitude of the rest of the Cadet Wing at this time?

HARDMAN: Well, at the present the rest of the Cadet Wing is not fully aware of the incident. Primarily because we are still investigating. I'm sure the attitude right now is one perhaps of suspicion—they wonder exactly what we are doing. Once the investigation is completely finished, then we will inform the Cadet Wing as much for instructional purposes as anything.

PAGE 2 RUWTRFA0402 UNCLAS

KKTV: Mr. Hardman, is it not true that some of the telephones that the cadets are using out here have signs which say in effect "Do Not Discuss Academic Matters" with a potential reference to possible recording of the conversation?

Hardman: No sir, Not academic matters, no sir.

KKTV: What did the sign say?

HARDMAN: Sir, we have not put signs on the telephones.

KKTV: There are no signs on any phones?

Hardman: What we have presently—we have restricted cadets as far as their information off base on base. And the reason behind this, sir, like I said earlier, this thing is being investigated. The General Cadet Wing is not fully aware of the circumstances. Therefore, we feel that any information that they might give the press would be nothing more than mere rumor.

KKTV: Are they restricted at this time?

HARDMAN: Yes, sir, they are.

KKTV: But yet they don't know why?

HARDMAN: Sir, they realize there is an honor investigation, and most of them accept it as that.

Jim Bibney: Of the twenty-three people allegedly involved, were they all, can you say whether they were actually involved in the cheating

PAGE 3 RUWTRFA0402 UNCLAS

or some of them tolerators and thereby violating the code.

C: Mr. Hardman, would you like to field that question?

Hardman: Yes, sir, actually the majority of the cadets who have tendered resignations are accused of toleration, sir, a minimal number have been accused of cheating.

Gibney: You said how many of the sixteen

Hardman: Sir, thirteen cadets.

Gibney: Thirteen were tolerated?

Hardman: No, sir, some men in the toleration and cheating because in this particular case they are actually pretty much similar.

Galligan: I think to answer your question more fully there are only three that are specifically charged with nothing but knowledge of cheating and tolerating it.

C: For those who may not understand what we're talking about on tolerating we may point out that the code is a very simple one it simply says that the cadet will not lie or cheat or steal and will not tolerate amongst them those who do. So that it's a breach of the Honor Code if you tolerate just as much as though you yourself were lying and cheating.

KKTV: General Clark, does this actually involve physical examination

PAGE 4 RUWTRFA0402 UNCLAS

papers that some of the cadets involved possibly have had in their possession? Is that correct?

Galligan: In one instance this is true. This is where an individual was allowed to take home in advance of when he should have been allowed to a take-home test, if your will—he was going on emergency leave and we wanted to give him an opportunity in before his classmates would get to it. Instead of completing test he turned it over to a group of his friends and they in turn solved the problem's collectively and used that input as their graded review. In most of the instances, in fact every other instance except that one the situation where word of mouth exchange had been made. For instance, an individual who took a test during a fifth period would meet with a group after the test was over brief them on what he had been tested on and that group would take the same test on the seventh period.

Hal Kennedy KKTV: After the White Committee came out in 1965, they suggested that the practice of successive days or successive tests be changed—would that have made any difference in this case.

GALLIGAN: That has actually been changed. They do not take the same test on different days. But these were the same tests in successive

PAGE 5 RUWTRFA0402 UNCLAS

periods during a given day so that the so-called M-Day tests were all given to the same group on that one day

and that the incidence I just related one was a fifth period man who took the test, passed it off to these members of the group who were going to take the test during the seventh period and they used sixth period to study for this test.

C: Needless to say, its impossible to have an academic environment without having a certain element of trust, and we haven't by any means eliminated completely the element of trust.

KKTV: But there's no faculty involvement of any kind.

C: No.

KKTV: No indication?

AP: General Clark is there any significance that many of these involved are second classmen?

C: Not to our knowledge at the moment we really shouldn't make conjectures until we have finished our investigation. Til the cadets finish their investigation. We really can't predict what the end result will be. It just happens that the pattern appears to fall largely in the second class, but there are a few instances where they are in other classes?

PAGE 6 RUWTRFA0402 UNCLAS

C: There are some leads which haven't fully investigated yet.

C: Anyone—any further questions?

KKTV: At this point there is no way or you would not venture a guess as to what your final number might be—there's no way to tell at this time.

C: I would rather not. It would be pure speculation.

Gibney: Sir, I wonder if we could get Cadet Wallace to explain briefly just how his honor committee functions in relation to the wing.

C: Yes indeed—Wallace?

Wallace: Well the honor committee is responsible for administering the honor code which means conducting the

actual honor investigations, holding honor hearings and conducting honor lectures and that's the extent of the involvement of the honor committee.

Gibney: How many are there in it?

W: There forty first class members—one per squadron and forty second class members.

Gibney: 80.

Hall Kennedy: General Galligan, I believe you said there had been 16 resignations to date—is that correct?

BT

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Galligan: Yes, sir.

Hal—KKTV: Now have these men been allowed to resign as opposed to getting dishonorable discharges, is that correct?

Galligan: That's right. They have been found guilty of violation of the honor code and their resignation was requested, and they voluntarily tended their resignation.

Gibney: That resignation is accepted—there is no type of a discharge is that right?

C: It's honorable.

Galligan. It's honorable discharge.

Gibney: It's honorable discharge.

AP: Are any of these resignations before today?

Galligan: No.

PAGE 2 RUWTRFA0403 UNCLAS

Hal Kennedy: May I go back to the case of last week, then. Can you give me a disposition on that case?

Galligan: That gentleman also resigned. Again, I'm not particularly sure which one you're talking about—we had four cases last week, wherein all four cadets resigned.

Hal Kennedy: And those were all involving examinations?

Galligan: No.

Hal: Oh, no they were not.

Galligan: No.

Hal: Well, the one I was speaking of was a man a cadet apparently involved in using a copy of a previous examination and information coming to us was that his roommate reported him in to the committee and that man pleaded innocent but was found guilty by the committee.

Galligan: Mr. Wallace?

Wallace: In the case you are referring to, if I'm thinking of the same case, there was no examination that he had—the case involved copying from his roommate and he was found guilty.

Hal: Has he resigned?

Wallace: Yes, he has resigned.

PAGE 3 RUWTRFA0403 UNCLAS

Channel 7 (Denver): General Clark, how many total honor code expulsions have there been to date—resignations—this year resignations through the academic year? To date. Would you put this in some sort of perspective?

C: About 21, I think.

Channel 7: Up to the 16th of January?

C: I'm not positive of that figure, but as I recall the average number for the last two or three years has been 20 and 30. I may be a little high for this year, because, of course, we are only half way through the year.

Channel 7: Would that figure include the sixteen today.

C: No.

Gibney: General Galligan, the four you said resigned last week is that in addition to the sixteen?

Galligan: Yes, those four.

Gibney: Are these other isolated cases?

Galligan: These sixteen I mentioned are those that resigned this calendar day as a result of the honor commit-

tee actions which resulted from last nights honor investigation.

KSSS: Was the four who resigned last week linked to the present honors investigation?

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Galligan: One was. The other three were independent.

C: That's as far as we know now, but again, it's a continuing investigation.

KSSS: Sir, was there any indication that any of these 16 resignations stem from the fact or that any honor code violations may have stemmed from the fact that any of these students were in academic trouble already?

C: Yes.

KSSS: How many?

C: I don't recall the number. Perhaps the dean might know. Clearly several of them were in academic difficulties, but by no means all of them.

How's our time?

C: Gentlemen, we have time for one or two more questions if you have any.

PRESS: Thank you, General.

BT

#0403

Colorado Springs *Gazette Telegraph*,

January 20, 1972:

The Air Force Academy is conducting an investigation into a possible cheating ring among Academy cadets, the Gazette Telegraph learned today.

• • • •

A statement from the Academy reads:

"The superintendent of the Air Force Academy, Lt. Gen. Albert P. Clark, announced this morning that the cadet wing commander and his staff in conjunction with the cadet honor committee have uncovered and are investigating a series of honor code violations associated with academic cheating.

"The investigation, which began early last evening, continued throughout the night implicating approximately 20 to 40 cadets.

"The cadet investigation is continuing in accordance with Academy procedures established to protect the integrity of the cadet honor code.

A press conference has been scheduled for 6 p.m. today in Arnold Hall to discuss the incident.

In attendance will be the Academy Superintendent, Gen. Clark, Brig. Gen. Walter Galligan, commandant of cadets; and Brig. Gen. William T. Woodyard, dean of faculty.

Cadets who are scheduled to be at the press conference are Cadet 1.C. Charles M. Hardman, cadet wing commander; and Cadet 1.C. Ronald E. Wallace, chairman, cadet honor committee.

Colorado Springs *Sun*

January 21, 1972:

Sixteen Air Force Academy cadets have resigned from the Cadet Wing in the wake of the academy's latest cheating scandal, Lt. Gen. Albert P. Clark, academy superintendent said Thursday.

Speaking at a press conference Thursday night, the superintendent said the cadet Honor Committee is conducting the entire investigation, and that some of its members were up all night Wednesday and all day Thursday with it.

The Honor Committee is questioning 75 cadets, but this does not necessarily mean that all are violators of the code. Some of these are witnesses who are expected to aid the investigation. Twenty-three are "seriously implicated," Clark said.

• • • •

The cadet honor code says, "we will not lie, steal or cheat, nor tolerate among us anyone who does."

The Honor Committee explains that this does not require a cadet to spy on his fellows, but if he becomes aware of an honor violation, he is to confront the suspected offender. The confrontation should either clear the matter up or cause the offender to turn himself in. "We have a loyalty to the Cadet Wing that must come before our loyalty to an individual who would tear down the high standards of the wing," the Honor Committee's publication says.

Denver *Post*

January 21, 1972

Sixteen cadets at the Air Force Academy resigned Thursday for being involved in academic cheating, Lt. Gen. A. P. Clark, academy superintendent, announced Thursday night.

Clark said 13 of the cadets were "tolerators" who violated the cadet honor code because they knew of the cheating and didn't report it. The other three cheated on academic tests, he said. All are members of the junior class.

• • • •

"The cadet honor committee has a working list of 75 names," Clark told reporters at a press conference. "This doesn't mean there are 75 cadets guilty of a breech of the honor code. We have to work through the list and

investigate carefully all leads befoer we'll know what we've got. At the moment, there are approximately 23 cadets who are seriously implicated by the evidence against them."

The superintendent was at Air Force headquarters in Washington when the results of an all-night investigation reached him Thursday morning.

He flew back to hold a 7 p.m. press conference in Arnold Hall, the cadet social center.

With Clark at the table were Brig. Gen. Walter T. Galligan, commandant of cadets; Brig. Gen. William T. Woodyard, dean of faculty; Cadet Col. Charles M. Hardman, Pittsburgh, Pa., cadet wing commander, and Cadet First Class Ronald E. Wallace, Mason, Ohio, chairman of the cadet honor committee.

Clark began the news conference by saying, "Your interest and that of the entire nation on the incident I reported today is, of course, understandable. The nation is entitled to the highest standards of integrity from among those young men here at the academy who are training for positions of great trust."

Denver *Rocky Mountain News*

January 22, 1972

The total of Air Force Academy resignations in the latest academic cheating investigation reached 39 Friday night as the Cadet Honor Board concluded its hearings.

• • • •

EIGHT APPOINTED SENIORS

The honor board is composed of eight seniors appointed by the honor committee.

Only one of the cadets ordered to a hearing was found innocent.

The hearings turned into a marijuana investigation Friday, according to academy spokesman. Four cadets were found to have been smoking marijuana and seven others are under investigation. All but two of these 11 were also found guilty of the honor code violations.

Colorado Springs Gazette

January 22, 1972

Honor hearings have been completed and 39 Air Force Academy Cadets have been found guilty of violating the Cadet Honor Code.

• • • •

The honor code states "We will not lie, cheat or steal, nor tolerate among us anyone who does."

In addition to those linked to the cheating, four cadets were found to have been smoking marijuana and seven additional cadets are under investigation for the same offense. All but two of these 11 cadets linked to marijuana use were among the 39 found guilty of honor violations.

"All of these cases where the honor violations are confirmed will result in resignations," said Lt. Gen. Albert P. Clark, academy superintendent.

Cadets who resign for honor code violations are given honorable discharges, he said. Those who refuse to resign would face court martial and would receive dishonorable discharges if found guilty.

Colorado Springs *Sun*

January 23, 1973

Gen. Clark issued a statement Saturday describing alternatives open to cadets who have been asked to resign who may not wish to resign.

General Clark said: "If a cadet refuses to resign after being found guilty by the cadet honor committee, his case is then referred to an administrative board of officers. The board of officers would then made a finding and recommendations, and could recommend dismissal with either an honorable, general, or undesirable discharge.

"This recommendation is then forwarded to the Academy Board (which consists of the superintendent, the commandant of cadets, the dean of faculty and senior faculty members). If the Academy Board determines the cadet should be separated, this recommendation is then

forwarded through the superintendent to the Secretary of the Air Force for final action.

"However, it is unlikely that evidence in the current cheating cases would warrant a court-martial, nor an undesirable or dishonorable discharge," General Clark's statement concluded.

Colorado Springs *Gazette Telegraph*

January 23, 1973

An investigation into honor code violations at the United States Air Force Academy was brought to an end Saturday with the resignations of 39 cadets from the military school, but a probe continued into allegations seven cadets had smoked marijuana.

Col. Arthur Ragen, director of information for the academy, said Saturday a total of 27 cadets violated one or more of the honor code provisions prohibiting lying, stealing or cheating while 12 cadets were guilty "solely of tolerating honor violations of other cadets," Ragen said.

In addition, four cadets found to have been smoking marijuana resigned and seven others remained under investigation Saturday.

The public information officer said that all but two of the students suspected of marijuana use were among the 39 cadets found guilty of honor code violations. Col. Ragen said he expected disclosures about the remaining seven cadets under investigation would be forthcoming sometime early in the week.

Of the first 16 cadets who resigned from the Academy in the latest cheating, 13 had admitted to cheating while three were found guilty of tolerating known honor violations.

Cadets who appear before the committee have a choice of voluntarily resigning or facing other action up to the possibility of a courts martial.

However Col. Ragen emphasized that even should a cadet refuse to resign and be court-martialed the chances

of his receiving a dishonorable discharge are practically nonexistent.

A cadet choosing the latter alternative has many courses of appeal.

First the case would be referred to a board of officers whose findings would be referred to the Academy Board. Should the Academy Board concur with the recommendation the results would be forwarded, through the Superintendent, to the Secretary of the Air Force.

The Academy public information officer said that through the latter course a cadet might receive an honorable, a general or possibly an undesirable discharge but that any final action would have to be cleared up to and including the Secretary of the Air Force.

SUPREME COURT OF THE UNITED STATES

No. 74-489

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ORDER ALLOWING CERTIORARI

Filed February 18, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-489

DEPARTMENT OF THE AIR FORCE, *et al.*,

Petitioners,

—v.—

MICHAEL T. ROSE, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Preliminary Statement

This brief is submitted in opposition to a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit seeking review of a judgment of that Court which reversed an order of the United States District Court for the Southern District of New York and remanded this case for an *in camera* inspection by the District Court of certain documents sought by respondents pursuant to the Freedom of Information Act, 5 U.S.C. §552.

Questions Presented

1. When a claim is made that the disclosure of documents sought pursuant to the Freedom of Information Act (the "FOIA") would cause a clearly unwarranted invasion of personal privacy within the meaning of exemption 6 of the FOIA, may an agency be required (i) to submit the documents to the District Court for *in camera* inspection and a determination as to whether personal identifying references can be deleted, and (ii) to produce such documents to respondents if the District Court determines that such deletions can successfully be made?

2. When a substantial public interest exists in documents sought pursuant to the FOIA, is exemption 2, pertaining to matters related solely to internal agency personnel rules and practices, inapplicable to such documents?

Statement of the Case

In a proceeding brought pursuant to the FOIA, respondents, who are members or former members of the New York University Law Review, have sought access to documents collected and maintained by the United States Air Force Academy relating to the operation of its disciplinary systems for use in connection with a study of disciplinary practices and procedures at the five service academies.

The documents sought are summaries of Honor Code adjudications assembled and maintained in the Academy's Honor Code reading files, with personal references or other identifying information deleted, and case summaries of Ethics Code adjudications located in the Academy's Ethics

Code reading files, also with personal references or other identifying information deleted.

Disclosure was initially refused by the Department of the Air Force on the sole ground that the case summaries were "personnel and medical files" exempt from disclosure under exemption 6 of the FOIA, 5 U.S.C. §552(b)(6), on the theory that their disclosure would constitute a "clearly unwarranted invasion" of the personal privacy of certain cadets whose identities might not be preservable through editing the summaries.

The District Court rejected this basis for non-disclosure, holding that ". . . disclosure of the summaries without names or other identifying information is not an invasion of personal privacy as proscribed by the sixth exemption" and noting that "revelation of a set of facts absent some type of association with a person's name seems . . . incapable of invading anyone's personal privacy" (App. C, pp. 32A, 30A).

Notwithstanding the fact that the District Court found that exemption 6, the only ground relied upon by respondents, would not be applicable if appropriate deletions were made, the Court nevertheless refused to order disclosure on the supposition that the documents sought "related solely to the internal personnel rules and practices of an agency" and were therefore exempt under 5 U.S.C. §552(b)(2) (App. C, pp. 33A-35A).

The Court of Appeals reversed that determination. The Court held that petitioners' withholding of the case summaries, if edited to preserve anonymity, could not be based on exemption 2 (App. A, p. 8A). The Court pointed out that the case summaries do not relate solely to internal per-

sonnel rules and practices because they "have a substantial potential for public interest outside the government", and " . . . all sectors of our society . . . have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets" (App. A, p. 8A).

With respect to exemption 6, the court below, on the basis of the record before it, declined to determine whether the disclosure of the redacted case summaries would entail a clearly unwarranted invasion of personal privacy (App. A, p. 13A). Instead, the Court of Appeals, relying on this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 (1973), held that petitioners had not carried their burden of proving that the summaries were exempt and remanded the case with instructions that the District Court conduct an *in camera* inspection of the summaries to determine whether personal, identifying references could be successfully deleted. If such deletions could be successfully accomplished, the summaries would be disclosed. If, on the other hand, identifying personal references could not be deleted, then disclosure would not be required (App. A, pp. 14A-15A).

The *in camera* inspection ordered by the Court of Appeals has not occurred, since the petition for a writ of certiorari has stayed the mandate of that court.

Reasons for Denying the Writ

1. The Court of Appeals did not require disclosure of the case summaries sought by respondents but merely directed that the summaries be produced to the District Court so that, in an *in camera* inspection, it could determine whether or not identifying personal references could be successfully deleted. This instruction by the Court of Appeals is fully consistent with the procedures authorized by this Court in *Environmental Protection Agency* v. *Mink*, *supra*, by the FOIA itself (5 U.S.C. §552(a)(2)),* and by numerous other appellate court decisions. See, e.g., *Bristol-Myers Co.* v. *FTC*, 424 F.2d 935 (D.C. Cir. 1970); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971); *Sterling Drug Inc.* v. *FTC*, 450 F.2d 698 (D.C. Cir. 1971).

Disclosure is to be required only if, and to the extent that, personal identifying references can be deleted. If such deletions can be made, as is highly likely (*see* App. A, p. 14A), petitioners would have no grounds for objection to the disclosure of sanitized case files.

In any event, this case presents no novel or significant question of statutory interpretation or judicial procedure under the FOIA and certainly presents no issues which can or should be decided prior to the *in camera* inspection required by the Court of Appeals.

2. Petitioners ignore the implications of the Court of Appeals' decision which requires, after an *in camera* inspection, only the disclosure of carefully edited case sum-

* Moreover, a recent amendment to the FOIA now expressly authorizes *in camera* inspections to determine whether all or parts of any documents sought pursuant to the Act may be exempt (5 U.S.C. §552(a)(4)(B), P.L. 93-1380).

maries, and argue that exemption 6 precludes the disclosure of *all* personnel files regardless of whether a clearly unwarranted invasion of personal privacy is likely. This construction of exemption 6 is illogical and totally at variance with settled and obvious principles of statutory construction. *Cf. Banks* v. *Chicago Grain Trimmers Ass'n,* 390 U.S. 459 (1968); *Flora* v. *United States,* 362 U.S. 145 (1960); *N.L.R.B.* v. *Coca-Cola Bottling Co.,* 350 U.S. 264 (1956). As the Court of Appeals noted, not all personnel or similar files are exempt from disclosure by exemption 6, but only those whose disclosure would necessarily involve a clearly unwarranted invasion of personal privacy. The Government cites no authority whatever for its contention that the qualification, "clearly unwarranted invasion of personal privacy", does not pertain to the medical and personnel files as well as to the "similar files" referred to in exemption 6.

3. The final reason advanced in support of the application for the writ is that the Court of Appeals incorrectly determined that disclosure of the case summaries was not precluded by exemption 2, since petitioners contend that the summaries relate solely to internal personnel rules and practices.

The Court of Appeals found that the summaries constituted "quasi-legal records" of "the significant facts in each case heard by the Honor Committee and in some important cases heard by the Ethics Committee" and that the practice of circulating anonymous abstracts of cases was not uncommon or unusual (App. A, pp. 9A, 10A, 14A n.18).

Moreover, the Court noted that the case summaries do not relate solely to internal personnel rules and practices because Honor Code cases have generated a substantial public interest outside the Academy—an interest enhanced by public discussions of the Honor and Ethics case summaries by high ranking Academy officers and civilian government officials. Finally, the court noted that even in the absence of official encouragement, substantial public interest in the operation of the Codes would exist by virtue of the fact that the service academies are publicly financed and cadets form a substantial portion of the country's future military leadership (App. A, p. 8A).

In view of these factors, the court below correctly concluded that the summaries do not relate solely to internal personnel rules and practices. That conclusion is consistent with the text and legislative history of the exemption and raises no issues which would warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1975

Supreme Court, U. S.
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No. 74-489

In the Supreme Court of the United States

OCTOBER TERM, 1974

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v.

MICHAEL T. ROSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

ROBERT H. BORK,
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In the Supreme Court of the United States

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---

1. Respondents assert that this case "presents no novel or significant question of statutory interpretation" because the court of appeals merely ordered that "carefully edited case summaries" be disclosed after *in camera* inspection (Br. in Opp. 5-6). Respondents ignore the important and recurring question presented by the petition —whether exemption 6 protects all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy." If our interpretation of exemption 6 is correct, the judicial inquiry ends once a file is determined to be a "personnel" or "medical" file,

and there is thus no statutory authority for the *in camera* inspection and "editing" ordered here.[1]

Neither the court of appeals nor respondents cite any authority to support the contention that Congress intended to subject the confidentiality of the millions of government personnel and medical files to the balancing test and editing procedures applied in this case. The more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material whose disclosure would violate privacy, and then provided confidential treatment for "similar files" whose disclosure also would have that effect. As the Senate Committee stated: "At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records" (S. Rep. No. 813, 89th Cong., 1st Sess., p. 3).[2]

---

[1]Respondents cite a recent amendment to the Freedom of Information Act, which "now expressly authorizes *in camera* inspections to determine whether all or parts of any documents sought pursuant to the Act may be exempt (5 U.S.C. §552(a)(4)(B), P.L. 93-1380)" (Br. in Opp. 5, fn.). However, the "segregable records" amendment was simply a statutory recognition of the procedures previously followed by the courts in segregating exempt from non-exempt portions of documents; it was not intended to amend any substantive exemption in the FOI Act (120 Cong. Rec. S9313, S9318 (daily ed., May 30, 1974) (remarks of Senators Kennedy and Hruska)). The 1974 amendments do not amend exemption 6 and if, as we urge, that exemption covers all personnel files, there is no occasion to conduct the *in camera* inspection that the amendments authorize.

[2]Upon signing the Freedom of Information Act into law, President Johnson declared: "Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure" (2 *Weekly Compilation of Presidential Documents* 895, July 11, 1966). Similarly, the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967) pointed out that exemption 6 "is intended to exclude from the disclosure requirements *all personnel and medical files*, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person * * * to whom the information pertains" (p. 36; emphasis added).

2. The court of appeals also held that exemption 2 of the Freedom of Information Act is inapplicable to the case summaries because Honor Code cases "have a substantial potential for public interest outside the Government" (Pet. App. A, p. 8A). The very enactment of the FOI Act, however, indicated that any government record could be the subject of substantial public interest. At the same time, Congress recognized that this public interest was outweighed by the need to protect particular categories of documents. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80. Thus, despite the possible public interest in internal personnel rules and practices, Congress determined to preserve the confidentiality of such records.

The court of appeals, however, held here that material with a "substantial potential for public interest outside the Government" has no protection whatsoever under exemption 2.[3] Nothing in the language or history of exemption 2 indicates that Congress thus intended to qualify the explicit statutory provision that protects documents concerning "internal personnel rules and practices."

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

---

[3]A district court recently adopted the same "substantial potential for public interest outside the Government" interpretation of exemption 2 (*Vaughn* v. *Rosen*, 383 F. Supp. 1049, 1053 (D. D.C.), appeal pending).

Supreme Court, U. S.
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BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–23A) is reported at 495 F. 2d 261. The opinion of the district court (Pet. App. C, pp. 26A–38A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D, pp. 39A–40A) was entered on March 29, 1974. A timely petition for rehearing was denied on May 29, 1974 (Pet. App. B, pp. 24A–25A). On August 20, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to September 26, 1974, and on September 16, 1974, he further extended the time to October 26, 1974. The petition was filed on

October 25, 1974 and was granted on February 18, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether exemption 6 of the Freedom of Information Act, which exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," covers all personnel files rather than, as the court of appeals held, only those whose disclosure "would constitute a clearly unwarranted invasion of personal privacy."

2. Whether exemption 6 bars disclosure of summaries of proceedings against cadets at the Air Force Academy accused of violation of the Honor and Ethics Codes, because such disclosure would constitute "a clearly unwarranted invasion of personal privacy."

3. Whether the exemption from disclosure in exemption 2 of the Freedom of Information Act for matters "related solely to the internal personnel rules and practices of an agency" is inapplicable, as the court of appeals held, if the material has "a substantial potential for public interest outside the Government."

STATUTE INVOLVED

The Freedom of Information Act, as amended, Pub. L. 93–502, 88 Stat. 1561, 5 U.S.C. 552, provides in pertinent part:

> Section 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *

> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.[1]
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> (b) This section does not apply to matters that are—
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> (2) related solely to the internal personnel rules and practices of an agency;
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> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
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> * * * * *

STATEMENT

This is a suit under the Freedom of Information Act, 5 U.S.C. 552, to compel disclosure of summaries of Air Force Academy Honor and Ethics Code cases. The Air Force Academy Honor Code states: "We will

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[1] This section was amended by the 1974 Amendments to the FOI Act, Pub. L. 93–502, 88 Stat. 1561. Prior to the amendments, Section 552(a)(3) read, in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *"

The amendments did not affect exemptions 2 and 6 of the Act, 5 U.S.C. 552(b) (2) and (6).

not lie, steal, or cheat, nor tolerate among us anyone who does." The Code is administered through a Cadet Honor Committee, composed of cadets, which conducts hearings for cadets accused of Honor Code violations. The Honor Committee's "Procedures for Honor Hearing" state: "* * * all matters discussed at the hearing are confidential and should not be discussed * * * with anyone other than an Honor Representative [a cadet selected by his fellows to administer the Code]." (App. 47, 83, 97, 100).[2]

The Cadet Honor Committee summarizes the significant facts of each case in detailed written case summaries which are distributed "for official use only" within the Academy to Honor Representatives and others charged with administration of the Code, on a "need to know" basis. Similarly, the Ethics Committee at the Academy, composed of cadets, administers the Ethics Code and conducts Ethics Code hearings for cadets which are similarly confidential. The Ethics Code case summaries are also distributed solely within the Academy "for official use only" (App. 28, 96–97, 156–157, 163–164, 174–175, 177, 187, 189–190).

Respondents were law students seeking disclosure of the case summaries, with the names of cadets deleted, to use "in the form of footnotes for illustration" in a law review note on disciplinary procedures at the military academies (App. 160, 164). The case summaries will also be maintained for public inspection in the library of the New York University Law School (App. 195). During lengthy interviews with respondent Rose, Academy officials gave him the

[2] "App." refers to the appendix lodged with the Court

Honor Code, the Honor Reference Manual, Lesson Plans, Honor Hearing Procedures, and various other materials explaining the Honor and Ethics Codes (App. 155, 162, 172). They denied access to the case summaries, however, because the summaries are so detailed that, even with the names deleted, "[s]ome cases may be recognized by the reader by the circumstances alone without the identity of the cadet given" and "[t]here is no way of determining just how these facts will be or could be used" (App. 21, 157).

Respondents then filed the present action in the United States District Court for the Southern District of New York seeking to compel disclosure of the case summaries pursuant to the Freedom of Information Act. The Superintendent of the Air Force Academy, the Commandant of Cadets and the Commandant's Executive for Honor and Ethics each filed in the district court affidavits stating that cadets who had been the subjects of Code hearings could be damaged for the balance of their lives if a reader connected the incident described in the case summary with a particular cadet (App. 21, 157, 181, 186). See Rose, *A Prayer for Relief,* p. 106, n. 631 (New York University Law School, 1973).

The district court held that the case summaries are exempt from mandatory disclosure under exemption 2 of the Act, 5 U.S.C. 552(b)(2), as "matters that are * * * related solely to the internal personnel rules and practices of an agency" (Pet. App. C, pp. 33A–35A). On appeal, petitioners, then appellees, urged affirmance on that ground, and also reiterated their contention, rejected by the district court (Pet. App.

C, pp. 29A–32A), that the case summaries are exempt from disclosure under exemption 6 of the Act, 5 U.S.C. 552(b)(6), as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

A divided court of appeals reversed. The court held that the case summaries are not covered by exemption 2 because they "have a substantial potential for public interest outside the Government" and "have great impact on the lives and careers of subject cadets" and therefore are different "from matters of daily routine like working hours, which, in the words of Exemption Two, do relate '*solely* to the internal personnel rules and practices of an agency'" (Pet. App. A, pp. 7A–8A; emphasis added).

The court recognized that the case summaries are "personnel" or "similar" files within the meaning of exemption 6, and that "identification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (Pet. App. A, pp. 10A–13A). But the court held that exemption 6 was inapplicable to the case summaries with "personal references and all other identifying information" deleted in view of "the statutory goal of Exemption Six: a workable compromise between individual rights 'and the preservation of public rights to government information'" (Pet. App. A, pp. 14A–15A).

Since the appellees had failed to "carry th[e] burden" of establishing the applicability of exemption 6,

the court required the Academy to "produce the summaries themselves in court" for *in camera* inspection. The court stated that it is "highly likely that the combined skills of court and Agency, applied to the summaries, will yield edited documents sufficient * * * to safeguard affected persons in their legitimate claims of privacy" (Pet. App. A, p. 14A).[3]

Judge Moore dissented on the ground that the majority decision overrode the specific prohibition of exemption 6 by allowing respondents to "pry into and seek to disclose the former transgressions of Air Force cadets," at a "time when the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched" (Pet. App. A, pp. 18A–19A). Judge Moore also noted: "Deletion of names suggested by the majority would be of no avail. In addition to names, identifiable facts would have to be eliminated. Eliminating all determinative essentials would only create a hypothetical situation" (Pet. App. A, p. 22A).

SUMMARY OF ARGUMENT

The court of appeals' interpretation of exemptions 6 and 2 of the Freedom of Information Act seriously jeopardizes the privacy of citizens by requiring the disclosure of highly damaging and derogatory material in government personnel files. The decision

[3] The court also stated that courts retain broad equitable power to decline to order disclosure which would damage the public interest, at least in "an exceptional case," but held that the issue "is not a substantial one" in the context of exemption 6 "since the language of the exemption requires a court to exercise a large measure of discretion" (Pet. App. A, p. 17A).

requires disclosure on the incorrect assumption that, by excising names and other identifying information, the particular individuals involved in disciplinary proceedings cannot be identified.

1. The decision of the court of appeals defeats the explicit intention of Congress, in enacting exemption 6, completely to exempt government personnel files from disclosure under the Act. The reference in that exemption to disclosure that would "constitute a clearly unwarranted invasion of personal privacy" qualifies disclosure only of "similar" files but not of "personnel and medical files." The Honor and Ethics Code summaries involved in this case are "personnel" files and as such are exempt from disclosure. Moreover, even if exemption 6 does require a showing that disclosure of personnel files would also constitute a clearly unwarranted invasion of personal privacy, the kind of files sought in this case, containing as they indisputedly do intimate details of a highly personal nature, are within the purview of exemption 6 and need not be disclosed under the Act.

2. The court of appeals also found that if a document has substantial potential for public interest outside the government, it does not relate solely to internal personnel rules and practices of an agency and accordingly is not exempted from disclosure under exemption 2. Such an interpretation vitiates exemption 2. The very fact that a suit is brought to disclose a document indicates that there is potential for public interest in the document, but public interest does not preclude the document from relating solely to internal personnel rules and practices of an agency.

ARGUMENT

I

EXEMPTION 6 OF THE FREEDOM OF INFORMATION ACT EXEMPTS ALL PERSONNEL FILES, NOT MERELY THOSE WHOSE DISCLOSURE CONSTITUTES "A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY"

1. Exemption 6 of the Freedom of Information Act excepts from the Act's disclosure requirements "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The court of appeals read this exemption as covering only those personnel files whose disclosures would constitute "a clearly unwarranted invasion of personal privacy" (Pet. App. A, pp. 10A, 12A–13A). We submit, however, that the determination whether disclosure would constitute such an invasion of personal privacy is required only in the case of "similar files," and that once it is determined that particular files are "personnel" or "medical," the judicial inquiry is at an end.

In other words, in exemption 6 Congress itself made the determination that disclosure of "personnel and medical files" would constitute an impermissible invasion of personal privacy. It is only when a file or document is not a personnel or medical file but rather is a file "similar" to such a file that the *additional* showing must be made that disclosure of such a file would constitute a "clearly unwarranted invasion of personal privacy." As the Fourth Circuit recognized (*Robles* v. *Environmental Protection Agency,* 484 F. 2d 843, 846): "'Similar files,' in order to qualify under the exemption, must fit the *additional* qual-

ifications set forth in the exemption, *i.e.*, they must contain information 'the disclosure of which would constitute a clearly unwarranted invasion of personal privacy' " (emphasis added).

The summaries of the Honor and Ethics Code violations involved in this case are "personnel" files. They relate to conduct by the cadets at the Academy, and are the basis for disciplinary action such as involuntary resignation or expulsion. They are just as much a part of a cadet's "personnel" file as the records of his academic and military performance. As such, they are protected from disclosure by exemption 6.

Congress did not intend the courts, before applying exemption 6 to personnel files, to determine whether disclosure of those files would constitute "a clearly unwarranted invasion of personal privacy"—an inquiry which, the court of appeals recognized, "involves an essentially unique investigation into the nature of the privacy interest invaded and the extent of the proposed invasion, viewed in the light of contemporary mores and sensibilities as applied to the particular facts" (Pet. App. A, p. 10A).

2. The language of exemption 6 does not compel the court of appeals' interpretation of it. To the contrary, the more reasonable interpretation is that Congress recognized that personnel and medical files traditionally contain confidential material that should be protected against disclosure and that other files also *may* contain such material. It therefore provided for confidential treatment of all personnel and medical files, and for such treatment of other files that share the relevant characteristic of personnel and medical

files—that is, files "whose disclosure would constitute a clearly unwarranted invasion of personal privacy." Congress certainly did not intend to subject the millions of government personnel and medical files to the balancing standards and editing procedures applied in this case, as a condition to maintaining their confidential character.

Indeed, in the case of medical files, Congress was legislating in the light of the well-established privilege covering the confidentiality of the doctor-patient relationship. If exemption 6 covers only those medical files that meet the "clearly unwarranted invasion" standard for nondisclosure, many doctor-patient communications that hitherto have been confidential would be subject to disclosure. Congress did not intend exemption 6 to have that effect. But if the invasion of privacy requirement that the court of appeals read into the personnel files portion of exemption 6 is correct, it also would cover the medical files portion of that provision.

Moreover, the structure of exemption 6 parallels that of exemption 4 in listing first a wholly exempt group of matters and, secondarily, a general category of matter which is exempt only if it satisfies certain criteria. Thus, exemption 4 speaks of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." "Trade secrets" are exempt without qualification; other "information" is exempt only if it meets specified conditions. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, pp. 32–34 (1967). Similarly, under

exemption 6, "personnel and medical files" are exempt without qualification; "similar files" are exempt only if their disclosure "would constitute a clearly unwarranted invasion of personal privacy."

3. The legislative history of exemption 6 confirms that Congress intended to provide complete protection for the confidentiality of personnel and medical files without requiring the government also to show in each case that disclosure of material in those files "would constitute a *clearly unwarranted* invasion of personal privacy" (emphasis added). The report of the House Committee stated that exemption 6 excluded from disclosure "those kinds of files the disclosure of which *might* harm the individual. The exemption is also intended to cover detailed Government records on an individual which *can* be identified as applying to that individual * * * " (emphasis added). H.R. Rep. No. 1497, 89th Cong., 2d Sess., p. 11 (1966). Congress did not intend that exemption 6 would expose the "vast amounts of personal data" collected by the government, "usually for limited purposes," such as "health, welfare, and selective service records [which] are highly personal to the person involved * * *." S. Rep. No. 813, 89th Cong., 1st Sess., p. 9 (1965). As the Senate Committee stated:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, *such as medical and personnel records* [*id.* at 3; emphasis added].[4]

[4] Upon signing the Freedom of Information Act into law, President Johnson declared: "Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure" (2 Weekly Compilation of Presidential Documents 895 (July 11, 1966)). Similarly, the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (1967) pointed out that exemption 6 "is intended to exclude from the disclosure requirements *all personnel and medical files*, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invation of the privacy of any person * * * to whom the information pertains" (p. 36; emphasis added).

4. One reason that Congress created a blanket exemption for personnel and medical files is the sheer magnitude of such files. Thus the Senate Report noted the wide variety of government personnel files, including those of the "Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc." and reported "a consensus that these files should not be opened to the public" (S. Rep. No. 813, *supra,* at 9).

The number of government personnel and medical files maintained by agencies such as the Civil Service Commission, the Veterans' Administration, and the Selective Service System is staggering and the information contained in such files is sometimes very detailed, very personal, and potentially very embarrassing. The Civil Service Commission has advised that it maintains more than 89 million personnel files. These include: 68 million official personnel folders on former federal employees; 15 million files relating to employee claims for retirement, insurance and health benefits which contain information on salaries, life and health insurance, designation of beneficiaries and medical histories; 2.6 million files containing the results of FBI loyalty investigations; and 2.25 million

files containing information relating to communist and subversive activities of individuals.

The Veterans' Administration has advised that it maintains approximately 35 million files. These include: 24 million records of all veterans', dependents' and survivors' claims for compensation, pension, education, retirement pay and medical or other benefits; 5 million applications for insurance with accompanying correspondence; and 6.5 million medical records of patients who have been given care and treatment by the VA. The Selective Service System states that it currently has approximately 15 million files of individuals who have registered with the System. These files contain the name, address, general physical description, and occupation of the registrant as well as the addresses of two persons who will always know his whereabouts. The Selective Service System also has 3.2 million files containing claims for hardship or conscientious objector status and 3.4 million reports of physical evaminations.

It is not realistic to think, indeed it is not conceivable, that Congress intended to permit such a broad scale disclosure of personnel and medical files or that Congress even expected that such files be subjected one by one to a judicial determination whether their disclosure would constitute a clearly unwarranted invasion of personal privacy, or to *in camera* inspection and a redacting process.[5]

[5] The recent amendments to the Act (Pub. L. 93-502, 88 Stat. 1561, 1562, 1564) relating to segregation of non-exempt portions of records and to *in camera* inspection by district courts do not change the nature of exemption 6 or alter the absolute exemption from

The confidentiality of some of the above kinds of personnel and medical files has hithertofore been con-

compelled disclosure for personnel files which that exemption confers. The 1974 amendments added to 5 U.S.C. 552(b) the provision:

"Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

This "segregable records" provision, as its legislative history illustrates, was simply a statutory recognition of the procedures previously followed by the courts in segregating exempt from non-exempt portions of documents; it was not intended to amend any substantive exemption in the Act (120 Cong. Rec. S9313, S9318 (daily ed., May 30, 1974) (remarks of Senators Kennedy and Hruska)). As Senator Hruska explained (120 Cong. Rec. S9318 (daily ed., May 30, 1974)):

"The provision dealing with deletion of segregable portions of records is procedural and requires the agency to segregate the disclosable portion of a record from the nondisclosable and to grant access to the disclosable portion. This provision reflects existing law, but is incorporated in this bill to clarify and emphasize the point. Being procedural in nature, it does not aid in the substantive analysis whether a particular exemption applies to a record or portions thereof. Instead, it applies once the court determines that portions of a record are disclosable, requiring the agency to divulge those portions. Thus, it would not apply where, for instance, an entire file was exempt such as under exemption 7."

The very terms of the new "segregable records" provision require deletion of exempt portions of the records. Since personnel files are themselves wholly exempt, they are not subject to segregation and even partial compelled disclosure under the Act.

Similarly, the new provision authorizing *in camera* inspection of requested records, Pub. L. 93-502, 88 Stat. 1561, 1562 (5 U.S.C. 552(a)(4)(B)), has no application to this case. That provision provides:

"* * * the court shall determine the matter *de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section * * *."

As already noted, the 1974 amendments do not substantively amend exemption 6 and if, as we urge, the exemption covers

ferred by various statutes or agency regulations.[6] But this does not mean that such files are not also protected from compelled disclosure by exemption 6. Indeed, one of the stated purposes of enacting exemption 6 was to obviate the need for a multitude of separate statutes to protect personnel and medical files. As the House Report on S. 1160, the bill which became the Freedom of Information Act, explained:

> Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record.[7]

In short, it is sufficient to invoke the exemption to show that a file, such as an Honor Code case summary, is a government personnel file; no further showing, editing, or *in camera* inspection is necessary.

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all personnel files, there is no occasion when dealing with such files to conduct the *in camera* inspection which the amendments authorize.

[6] For example, 32 C.F.R. Part. 1608 protects the confidentiality of information submitted by registrants to the Selective Service System. 38 U.S.C. 3301 and 38 C.F.R. 1.500–1.527 require confidential treatment of information relating to claims made to the Veterans' Administration. Cf. *Dow* v. *Robertson*, No. 74–450, argued April 15, 1975.

[7] H.R. Rep. No. 1497, *supra*, at 11.

II

IN ANY EVENT, THE DISCLOSURE OF THESE FILES WOULD CONSTITUTE "A CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY"

If, contrary to our submission, the "clearly unwarranted invasion of personal privacy" requirement in exemption 6 applies to Honor and Ethics Code case summaries, the court of appeals nevertheless improperly required an *in camera* district court examination of the summaries to eliminate information that could result in identifying the cadets involved in the violations. The court of appeals' own analysis of the summaries shows that exemption 6 bars their disclosure even if the invasion of privacy criterion is imported. Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 81, 93–94.

The court of appeals believed that the harm that might result to the cadets from disclosure of the summaries could be minimized or eliminated by the *in camera* screening and excision it ordered. It nevertheless recognized that even this procedure might not protect the cadets from disclosure of their involvement in the Code violations—a disclosure that could have a serious adverse impact upon their subsequent careers, both in the military and elsewhere.

Speaking of summaries "with names omitted," the court stated: "[I]dentification of disciplined cadets—a possible consequence of even anonymous disclosure—could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends" (Pet. App. A, p. 12A, 13A). The court noted that

those best situated to identify the subject of a nameless summary would be former cadets and Academy officials who "had access to these records originally" (Pet. App. A, p. 11A). However, the court also recognized that—

> [a] senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection. [Pet. App. A, p. 12A.]

Similarly, the court recognized:

> [P]ublication of even anonymous summaries could expose the histories of formerly accused cadets to persons other than Air Force officers. Despite the continuing injunction of secrecy, no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty. [Pet. App. A, p. 12A.]

The ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports and files is strikingly illustrated by the recent case involving government files relating to Ezra Pound. A researcher, who had received data concerning Ezra Pound from the files of the FBI, identified a number of individuals who had furnished data on Pound to the Bureau, despite the fact that the names and addresses of such individuals, as well as other pertinent identifying data, were deleted from the information furnished to the researcher in an attempt to "redact" the files to avoid such identification (see The New York Times, Book Review Section, p. 47, April 21, 1974; 120 Cong. Rec. S9333–S9334 (daily ed., May 30, 1974)).

The reason that such "editing" of the data is likely to be ineffective in preserving the anonymity of the people involved is that where the entire group itself is relatively small, even a few details may enable people familiar with the subject to identify the particular individuals involved. The number of cadets in the Air Force Academy at any one time is sufficiently small that the Honor and Ethics Code summaries, even with significant deletions, are likely to be sufficiently suggestive and informative to enable those familiar with the Academy to draw accurate inferences concerning the identity of the cadets involved in the particular violations described.

Congress in exemption 6 did not intend to authorize the courts to require disclosure of files of the kind involved in this case on the basis of excision of "personal references and all other identifying information" (Pet. App. A, p. 15A) in the files—a process which, by its very nature, cannot adequately protect the confidentiality that Congress wished to ensure by exemption 6.[8]

[8] If the redaction ordered by the court of appeals cannot adequately protect the cadets' privacy, the *in camera* inspection ordered to further that process is not appropriate, and the 1974 Amendment authorizing *in camera* inspection does nothing to

The court of appeals stated (Pet. App. A, p. 15A) that if the deletion of "personal references and all other identifying information" is, "in the opinion of the district judge," "not sufficient to safeguard privacy, then the summaries should not be disclosed to appellants." This statement is inconsistent with the court's own view that it is "highly likely" that such deletion would be adequate to accomplish that objective—a view reflecting the court's belief that exemption 6 constitutes "a workable compromise between individual rights 'and the preservation of public rights to government information' " (Pet. App. A, pp. 14A–15A). Despite the court of appeals' suggestion that the district court ultimately might decline to disclose some of the summaries, the practical effect of its decision will be to permit disclosure of material that Congress intended to keep confidential pursuant to procedures that Congress did not contemplate.

The probable result of the court of appeals' decision in this case would be a serious violation of the right of privacy of a large number of cadets at the Air Force Academy.[9] This case, therefore, implicates an

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bolster the court of appeals' disposition of the case (see n. 5, *supra*, pp. 14–16).

[9] Compare *Rural Housing Alliance* v. *United States Department of Agriculture*, 498 F. 2d 73 (C.A.D.C.), where the court of appeals, in dealing with the category of "similar" files, instructed the district court on remand to "reconsider and re-evaluate" a government affidavit which contended that the files contained personal information so detailed that the privacy of the named individuals could not be adequately protected by a deletion process (*id.* at 78). In contrast to the Second Circuit's view that exemption 6 must be given a "narrow" construction (Pet. App. A, pp. 5A, 9A), the District of Columbia Circuit declared that exemption 6 is "phrased broadly to protect individuals from a wide range of embarrassing disclosures" (498 F. 2d at 77). The files involved there were statements of and records concerning persons who had allegedly been discriminated against by the Farmers Home Administration.

additional factor beyond the usual Freedom of Information Act case, in which the competing considerations are the public interest (1) in obtaining information about the government and (2) in avoiding disclosure that may interfere with the proper functioning of government. In exemption 6 of the Freedom of Information Act, Congress expressly undertook to protect the right of privacy. As the Report of the Senate Committee stated (S. Rep. No. 813, *supra* at 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important right of privacy with respect of certain information in Government files, such as medical and personnel records.[10]

The instant case is among the most compelling for protecting the individual's interest in privacy. Public disclosure, even accompanied by an admittedly imperfect editing process, threatens the persons who were

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[10] See also the congressional findings in the recently-enacted Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a note):

"Sec. 2. (a) The Congress finds that—

"(1) the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal agencies;

* * * * *

(4) the right to privacy is a personal and fundamental right protected by the Constitution of the United States * * *.

* * * * *

the subjects of Honor and Ethics Code hearings with lifelong disgrace at a time when, as Judge Moore stated in his dissent, "the courts are more and more being called upon to protect an individual's character from being unnecessarily besmirched * * *" (Pet. App. A, p. 18A).

III

THE CASE SUMMARIES ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 2 OF THE ACT, AS MATTERS "RELATED SOLELY TO THE INTERNAL PERSONNEL RULES AND PRACTICES OF AN AGENCY"

Exemption 2 excepts from disclosure matters "related solely to the internal personnel rules and practices of an agency." The Honor and Ethics Code case summaries involve the "internal personnel rules and practices" of the Air Force Academy (see *infra*, p. 23). The court of appeals ruled, however, that this exemption was inapplicable here because the case summaries "have a substantial potential for public interest outside the Government" (Pet. App. A, p. 8A). The court's apparent rationale was that, because of the "potential for public interest," the summaries do not relate "solely" to internal personnel rules and practices (*ibid.*). This is a misinterpretation of exemption 2, which reads into the exemption a qualification that Congress did not make and that would seriously weaken it.

The fact that particular government documents relating to internal personnel rules and practices may "have a substantial potential for public interest outside the Government" does not change their character as matters that relate "solely" to those rules and

practices. There frequently will be substantial public interest in matters that relate "solely" to internal agency personnel rules and practices. The standard Congress promulgated to protect the confidentiality of those rules and practices, however, is whether the matters sought to be disclosed relate "solely" to them and not whether there may be a substantial public interest outside the government with respect to them.[11]

The present case illustrates this distinction. The Honor and Ethics Code summaries are written by cadets for use by other cadets and Academy officials in connection with the operation and administration of the Academy and the maintenance of the voluntary Honor and Ethics Codes. The Codes provide the standards by which the cadets guide their own conduct while at the Academy. The Code hearings are confidential—attended solely by cadets and appropriate Academy officials.

The case summaries thus relate "solely to the internal personnel rules and practices" of the Academy. They involve the discipline, training and fitness of cadets. They are administered and enforced on a confidential basis by the cadets themselves and exist wholly apart from the formal system of courts martial and the Uniform Code of Military Justice (App. 13–15, 80–81, 83, 96–97, 110, 156–157, 174–175, 177).

In enacting exemption 2, Congress intended to

[11] This analysis equally applies to the court of appeals' reasoning that the case summaries do not relate "solely" to internal personnel rules and practices for the additional reason that they "have great impact on the lives and careers of subject cadets" (Pet. App. A, p. 8A).

avoid the substantial prejudice to the effective performance of agency functions which disclosure of internal personnel rules and practices would cause. See Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, *supra* at 30–31. This rationale of exemption 2 is especially applicable to personnel measures undertaken by the armed services for the discipline and training of its military personnel. Cf. *Parker* v. *Levy*, 417 U.S. 733, 743, 744; *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896. Here, if the confidentiality of the Honor and Ethics hearings were broken through release of case summaries to the general public, both the Honor and Ethics Code systems and, to an extent, the effective operation of the Academy would be impaired.

To take one example, the option of returning a cadet who has been voted guilty to the Cadet Wing (the discretion option) would be seriously weakened. As Brigadier General Galligan explained, the use of discretion is designed to permit a cadet to return to the Cadet Wing "unblemished to continue his education." "The man who has learned his life-long lesson of honor can be a great asset to the Wing and to the Air Force. His retention is therefore not only justified; it is desired." But "[t]o permit release of case summaries or write-ups of either Honor or Ethics incidents even though not notorious could reach his home town or his friends and become an indelible blot on his future" (App. 186).

Perhaps most importantly, public availability of the materials sought by respondents could impair the

effective functioning of the toleration clause ("We will not * * * tolerate among us anyone who does [lie, steal, or cheat]" (App. 47)), which is the "backbone of the Cadet Honor Code" (App. 59). As Brigadier General Galligan stated, "Each cadet fully understands the spirit behind the toleration clause, as well as the obligation it creates and the method of reporting a suspected honor violation" (App. 186). But the resolve of cadets to live up to the standards by the toleration clause would be seriously weakened if cadets no longer had the absolute assurance that their reports would be completely confidential.

The character of the Code summaries as matters that relate solely to the Academy's internal personnel rules and practices is not altered by the fact that there may be substantial public interest in the way the Codes operate. Such public interest also exists with respect to other types of government internal procedures that the legislative history of exemption 2 shows Congress specifically intended it to cover, such as the Treasury Department's instructions for the proper conduct of a "stakeout" or the manuals instructing auditors of government contractors how to detect irregularities.[12] Such public interest, however,

[12] H.R. Rep. No. 1497, *supra*, at 10; Hearings on H.R. 5012, *et al.* (Government: Federal Public Records Law), before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., p. 29 (1965); 112 Cong. Rec. 13659 (1966); *City of Concord* v. *Ambrose*, 333 F. Supp. 958 (N.D. Cal.); *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787, 795 (C.A. 6); *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.), reversed on other grounds, 484 F. 2d 1086 (C.A.D.C.), certiorari denied *sub nom. Rosen* v. *Vaughn*, 415 U.S. 977.

does not except that material from the coverage of exemption 2.

The "potential for public interest" exception which the court of appeals (Pet. App. A, p. 8A) has grafted onto exemption 2 largely undermines the exemption and severely limits the confidentiality of agency documents Congress intended to protect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

DEPARTMENT OF THE AIR FORCE, ET AL., PETITIONERS

v.

MICHAEL T. ROSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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IN THE

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OCTOBER TERM, 1975

No. 74-489

DEPARTMENT OF THE AIR FORCE, *et al.*,

Petitioners,

—v.—

MICHAEL T. ROSE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Questions Presented

1. Whether exemption 6 of the Freedom of Information Act (the "FOIA"), relating to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," automatically exempts from disclosure, without *in camera* inspection, abstracts of Honor and Ethics Code cases, with names and identifying references deleted, which have been adjudicated by, and internally disseminated within, the United States Air Force Academy?

2. Whether exemption 2 of the FOIA, exempting from disclosure matters related "solely to internal agency per-

sonnel rules and practices" applies to the Air Force Academy's Honor and Ethics Code case abstracts reflecting the results of its disciplinary system, publicly claimed by the Air Force to be a significant aspect of the training of future Air Force officers?

Statement of the Case

In a proceeding brought pursuant to the FOIA, Respondents, who are members or former members of the New York University *Law Review*, have sought access to official Air Force records collected and maintained by the United States Air Force Academy. The records relate to the operation of the Academy's disciplinary system and are sought for use in connection with a study conducted under the auspices of the *Law Review* of disciplinary practices and procedures at the five service academies. (App. 173, 188-192)

The documents at issue are case abstracts of Honor and Ethics Code adjudications assembled and maintained in the Academy's Honor and Ethics Code reading files, with personal references or other identifying information deleted. The Respondents themselves have requested the deletion of identifying references, notwithstanding the fact that the abstracts are posted at forty different locations at the Academy in an unedited form which includes the names of individuals found to have violated the Honor or Ethics Codes and, in that form, are available for inspection by, and discussion among, Academy cadets, faculty and administration (App. 2-3, 18, 109-110, 164, 189).

The Academy Honor Code provides that "[w]e will not lie, steal, cheat, nor tolerate among us anyone who does."

The sanitized case abstracts reflect the substantive content of the Honor Code's injunctions against "lying," "cheating," "stealing" or "tolerating." This content has developed over the life of the Code through the case-by-case adjudication of Code violations; no other source for this information exists. Respondents have emphasized in administrative proceedings and in the courts below that they have no interest in ascertaining the identity of any cadet involved in disciplinary proceedings and that the redacted summaries have been sought solely for the purpose of analyzing the Code's substantive content (App. 2-3, 18-19, 47, 57).

Acting pursuant to Air Force Regulations requiring specification of the exemption relied upon as the ground for non-disclosure (App. 129), the Air Force refused disclosure of the abstracts on the grounds that they were covered by exemption 6 of the FOIA and by Air Force Regulations 4(f) and 4(g)(1)(b) (App. 21, 121-122).

The District Court, adjudicating the case on cross-motions for summary judgment rejected exemption 6 as a basis for non-disclosure.[1] The court held that disclosure of the summaries, if subsequently edited to preserve anonymity, would not constitute a clearly unwarranted invasion of personal privacy within the meaning of exemption 6, stating:

> "Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy. It is only the

[1] The parties cross-moved for summary judgment, but the plaintiffs also requested *in camera* review (Pet. App. C, p. 26A, Pet. App. A, p. 14A).

identifying connection to the individual that casts personnel, medical and similar files within the protection of the sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder released" (Pet. App. C, pp. 30A-31A).

The District Court also rejected the Air Force's contention that even the disclosure of edited case summaries would involve a clearly unwarranted invasion of personal privacy because the edited summaries might provide information permitting the correlation of a Code violation with a particular cadet. The court stated:

> "While it is possible that a reader, in conjunction with facts learned long since cadet days, might successfully conjecture about an identity if he had not learned it when he was at the Academy, no one can be harmed. This hypothetical reader, necessarily once a cadet, has subscribed to the nature and workings of the Honor Code. . . . Even if 'society' deems case summaries to be of a quasi-criminal nature, no stigma could attach to a former cadet because no one outside the cadet/former cadet universe could possibly connect a name with a case" (Pet. App. C, pp. 31A-32A).

Having concluded that exemption 6, the only exemption relied upon by Petitioners, would not be applicable if appropriate deletions were made, the District Court nevertheless refused *sua sponte* to order disclosure, on the assumption, not argued by the government, that the documents "related solely to the internal personnel rules and practices of an agency" and were therefore exempt under 5 U.S.C. §552 (b)(2) (Pet. App. C, pp. 33A-35A).

The Court of Appeals reversed. It held that the withholding of the case summaries, if edited to preserve anonymity, could not be justified by exemption 2 (Pet. App. A, p. 8A). The court concluded that the case summaries do not relate solely to internal personnel rules and practices, in view of extensive public interest and discussion about the Codes and about disciplinary matters at the Academy—interest and discussion generated and encouraged by the Academy. The court also stated:

> "Of course, even without such official encouragement, there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline" (Pet. App. A, p. 8A).

With respect to exemption 6, the Court of Appeals did not determine whether the case summaries constituted "personnel" or "similar" files (Pet. App. C, p. 10A). The court also declined to determine whether disclosure of the redacted case summaries or any portion of them was proscribed by exemption 6 (Pet. App. A, p. 13A). Instead, relying on this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 (1973), the court held that Petitioners had not carried their burden of proving that the summaries came within this exemption and remanded the case with instructions that the District Court conduct an *in camera* inspection of the summaries to deter-

mine whether personal, identifying references could be successfully deleted, considering the *in camera* procedure "a workable compromise between individual rights 'and the preservation of public rights to governmental information'" (Pet. App. A, p. 15A). If such deletions could be successfully accomplished, the summaries would be disclosed. If, on the other hand, identifying personal references could not be deleted, then to that extent disclosure would not be required (Pet. App. A, pp. 14A-15A).

The *in camera* inspection ordered by the Court of Appeals has not occurred, since the court has stayed its mandate pending disposition of the Petition for Certiorari.

Summary of Argument

1. The Honor and Ethics case abstracts are not personnel files. They are summarizations of cases adjudicated by the Academy's Honor and Ethics Committees and internally disseminated at the Academy for *stare decisis* and pedagogical purposes. Petitioners' argument that the case abstracts are personnel files was not made to the courts below and is contradicted by their own Regulations. Air Force Regulations implementing the Freedom of Information Act distinguish between "personnel and medical files" and "files similar to personnel and medical files" and include in the latter category documents relating to disciplinary action, such as the case abstracts. In contrast to the case abstracts which are posted at forty different locations throughout the Academy, personnel files, as the term is commonly used, are not subject to wide intra-agency disclosure and distribution. Typically, an employee

would not have complete access even to his own personnel file and it would be extremely unusual for other employees to have access to personnel files of fellow employees.

2. The legislative history of exemption 6 indicates that Congress intended to permit the disclosure of information that might be contained in medical or personnel files as well as similar files if no clearly unwarranted invasion of personal privacy would occur. Congress did not intend a *per se* exemption for medical and personnel files, recognizing that files labeled "medical" or "personnel" might contain non-confidential information which could be publicly disclosed with no clearly unwarranted invasion of personal privacy. A recent amendment to the FOIA specifically provides that segregable portions of records be disclosed after the deletion of exempt portions of such records. The legislative history of that amendment indicates that Congress intended to endorse FOIA decisions requiring the disclosure of non-confidential portions of confidential documents or files and intended to extend the segregation principle to all exemptions to the FOIA's disclosure provisions.

3. Disclosure of the redacted case abstracts will not involve a clearly unwarranted invasion of personal privacy. As Respondents have requested and as the Court of Appeals has directed, names and all identifying references are to be deleted from the abstracts prior to disclosure. Such deletions will be made by Petitioners in the context of continuing judicial supervision. Once the deletions are made, no clearly unwarranted invasion of personal privacy will result from disclosure of anonymous, sanitized summaries of past disciplinary adjudications.

4. The Court of Appeals recognized that because discipline at the Academy, as it affects the training of future Air Force officers, had such important implications for the general public, the case abstracts could not be understood to relate solely to the Academy's internal personnel rules and practices within the meaning of exemption 2. This conclusion is particularly appropriate since the Academy, not the Court of Appeals, originated the concept that the public has an important stake in Academy disciplinary matters. The legislative history of exemption 2 indicates that it was intended to exempt from disclosure documents relating only to routine internal personnel matters such as parking facilities and lunch hours—documents concerning which the administrative burden of assembling and retaining for public inspection would outweigh any reasonably foreseeable benefits from their disclosure. The legislative background of exemption 2 indicates that Congress contemplated that the exemption would apply only to a narrow category of routine internal personnel documents, but not to all matters concerning the internal management of a government agency.

ARGUMENT

I.

The Honor and Ethics Code case abstracts are not personnel files.

Contrary to Petitioners' submission, the Honor and Ethics case abstracts are not personnel files within the meaning of exemption 6 and, if covered at all by exemption 6, are "similar files." The abstracts are not verbatim transcripts of proceedings before the Cadet Honor Committee. Rather, in the words of Colonel M. E. Kinevan, the Academy Staff Judge Advocate, they are "brief, one-page summarizations of each case" disseminated at the Academy for purposes "related to training and administration"[2] (App. 164).

Air Force Regulations sharply distinguish between "personnel and medical files," 32 C.F.R. 806.5(f), and "files similar to medical and personnel files." 32 C.F.R. 806.5(g). The Regulations unambiguously define "similar files" to include documents like Honor and Ethics Code case abstracts. According to the Regulations, "examples of similar files are those: containing reports, records, and other material pertaining to personnel matters in which administrative action, including *disciplinary action,* may be taken or has been taken" 32 C.F.R. 806.5(g)(1)(ii) (emphasis supplied) (App. 121-122).

Ignoring their own Regulations, Petitioners maintain that the case abstracts are personnel files on the grounds that

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[2] The Court of Appeals observed that "[t]he practice of furnishing abstracts of cases, while preserving anonymity, is not unknown to the law" citing Revenue Rulings collected in Cum. Bull. of the IRS and ABA Opinions on Professional Ethics (1967) (Pet. App. A, p. 14A, n. 18).

the summaries "relate to conduct by the cadets at the Academy, and are the basis for *disciplinary action* such as involuntary resignation or expulsion" (p. 10, Petitioners' brief) (emphasis supplied). The argument that the abstracts are personnel files is directly inconsistent with Air Force Regulations but would fail even if the Regulations had not clearly resolved the question. Documents may relate to employee conduct or to disciplinary matters without becoming "personnel files." If a relationship with conduct or with disciplinary matters were sufficient to transform documents into personnel files, totally insulated from even limited, judicially supervised disclosure, then the legislative compromise struck in exemption 6 between rights of individual privacy and public access to the non-confidential portions of files that might have been arbitrarily labeled "personnel files," would be eviscerated. (See pp. 13-14, *infra*.)

Common practice and definition also compel the conclusion that the abstracts are not personnel files. "Personnel files," as the term is commonly used, pertains to the files maintained by the personnel department of an agency or employer. These files contain documents such as an employee's employment application, references from previous employers, attendance record, the results of civil service examinations, medical history and supervisory evaluations of work performance. Traditionally, access to personnel files is strictly limited to members of the personnel department and to supervisory personnel directly involved with the particular employee. In most instances, an employee does not have access to his own personnel files and it would be highly unusual for employees to have access to the personnel files of their fellow employees.

It would, we submit, be extraordinary for "personnel files" or confidential documents from such files to be posted

on bulletin boards, or disseminated to other employees for didactic purposes or because of general intra-agency administrative considerations. When documents like the Honor and Ethics case abstracts are afforded such treatment, they cannot reasonably be considered "personnel files" under exemption 6.[3]

The courts below did not make a factual finding that the case abstracts are personnel files, automatically exempt from disclosure, because, among other reasons, the distinction between "personnel" and "similar" files pressed here by Petitioners was not advanced by them below. Nor did the courts below find the categorization of files as "medical," "personnel" or "similar" to be critical to the resolution of this case. The District Court held that regardless of whether the abstracts are "medical," "personnel" or "similar" files, their disclosure would not involve a clearly unwarranted invasion of personal privacy (Pet. App. A, pp. 31A-33A). The Court of Appeals, describing the documents as "personnel" or "similar" files, remanded the case to permit the District Court to determine whether the deletions of identifying references could be effected (Pet. App. A, pp. 10A, 14A).

In short, even if judicial inquiry were more limited in the case of "personnel" files than "similar" files, Air Force Regulations, the courts below and common practice and definition all support the conclusion that the case abstracts are similar files and not personnel files.

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[3] The millions of personnel and medical files maintained by agencies such as the Civil Service Commission, the Veterans Administration and the Selective Service System to which petitioners would analogize the Honor and Ethics case abstracts are not files that are made generally available to agency employees and are not, in any event, similar to the case abstracts. Furthermore, personnel files, such as those referred to by petitioners, are expressly protected by the Privacy Act of 1974 (P.L. 93-579, 88 Stat. 1896, 5 U.S.C. §552(a)).

II.

In any event, exemption 6 of the Freedom of Information Act exempts only documents whose disclosure would involve a clearly unwarranted invasion of personal privacy.

Exemption 6 permits nondisclosure of "personnel and medical files and similar files the disclosure of which would involve a clearly unwarranted invasion of personal privacy." The courts which have interpreted this exemption have properly concluded that if no clearly unwarranted invasion of privacy would result from the disclosure of documents, no good reason would exist for their nondisclosure regardless of whether such documents might have originally been contained in a "personnel," "medical" or "similar" file. See, e.g., *Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F.2d 73, 77 (D.C. Cir. 1974); *Robles* v. *Environmental Protection Agency,* 484 F.2d 843, 845 (4th Cir. 1973); *Getman* v. *NLRB,* 450 F.2d 670, 674 (D.C. Cir. 1971).

The legislative history of exemption 6 indicates that Congress was concerned with the protection of confidential information of the type frequently contained in personnel or medical files and sometimes contained in similar files. That history indicates that Congress did not intend a *per se* exemption for personnel files or for medical files, but, on the contrary, suggests that Congress recognized that even files clearly denoted "personnel" or "medical" files (which the case abstracts are not) might contain non-confidential information of value and interest to the public which could be disclosed without causing a clearly unwarranted invasion of personal privacy.

The House Report states:

> "6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy: Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records" (H.R. Rep. No. 1497, 89th Cong. 2nd Sess. p. 11).

In similar language, the Senate Report states:

> "Exemption No. 6 contains an exemption for 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great

quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'

"The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public" (S. Rep. No. 813, 89th Cong. 1st Sess. p. 9).

Under the *per se* approach to medical and personnel files proposed by Petitioners, non-confidential information located in files labeled "personnel" or "medical" files would be insulated from disclosure. Moreover, the propriety of the initial decision to insert such information—or any information—in a "personnel" or "medical" file would be effectively insulated from judicial scrutiny. This *per se* approach would inject into the FOIA serious obstacles to public access to information in the hands of the govern-

ment—obstacles not intended by Congress which would weaken the Act. As one court pointed out in discussing the application of exemption 6 to medical files:

> "Where a purely medical file is withheld under the authority of Exemption 6, it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked. It will obviously not be enough for the agency to assert simply that it received the file under a pledge of confidentiality to the one who supplied it. Undertakings of that nature cannot, in and of themselves, override the Act."

Ackerly v. *Ley,* 420 F.2d 1336, 1339-40 n. 3 (D.C. Cir. 1969). See also *Rural Housing Alliance* v. *United States Department of Agriculture,* 498 F.2d at 77.

The release of edited files is now required by the 1974 Amendments to the FOIA (Pub. L. 93-502, 88 Stat. 1561, 1562, 1564). 5 U.S.C. §552(b), as amended, provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." The legislative history of this amendment indicates that Congress intended to endorse prior judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files or documents. See, *e.g., Vaughn* v. *Rosen,* 484 F.2d 820, 825 (D.C. Cir. 1974) *cert. den.* 415 U.S. 1136; *Soucie* v. *David,* 448 F.2d 1067, 1079-80 (D.C. Cir. 1971); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Bristol-Myers Co.* v. *Federal Trade Commission,* 424 F.2d 935, 938-39 (D.C. Cir. 1970).

As Senator Kennedy, a principal sponsor of the amendments, stated concerning the segregable records provision:

"S. 2543 adds a new provision to the Act stating that if exempt portions of requested records or files are severable, they should be severed—or deleted, as the case may be—and the nonexempt portions disclosed. Many courts are requiring this now, and the bill emphasizes the desirability of this approach in providing specifically that courts may order disclosure of 'portions' of files or records as well as entire files or records." (120 Cong. Rec. S. 9313 (daily ed.) May 30, 1974.)

The segregable records provision is also closely related to the amendment specifically authorizing *in camera* inspection of documents claimed to be exempt (5 U.S.C. §552(a)(4)(B)(i)). This relationship was explained as follows by Senator Kennedy:

"Taken together these provisions are intended to require agencies, and courts, to look at the information requested—not the title of the document or a restricted-access stamp or the fact that the record is in a file marked 'Confidential' or 'Investigation'—to determine whether the information should be released under the Freedom of Information Act" (*Id.* at S. 9315).

As applied to cases involving claims based on exemption 6, the legislative history of the 1974 amendments underscores the validity of the conclusion reached by the courts below in this case. Senator Kennedy continued:

"For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy'" (*Id.*).[4]

III.

Disclosure of the Honor and Ethics case abstracts with names and identifying references deleted would not involve a clearly unwarranted invasion of personal privacy.

Exemption 6 does not preclude disclosure of the Honor and Ethics case abstracts unless a clearly unwarranted invasion of personal privacy would result. Respondents have requested access to the Honor and Ethics case ab-

[4] The mechanics of *in camera* review and judicial editing of partially exempt material were further described as follows by Senator Kennedy:

"With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. The Senate report in this respect cites with approval the type of procedure set out in the District of Columbia Court of Appeals in the case of Vaughn v. Rosen, requiring the Government to sustain its burden of justifying its withholding of each element of a contested file or record. That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure. This should result in maximum possible disclosure and is consistent with the original congressional purpose in enacting the Freedom of Information Act.

"This new requirement is also consistent with most judicial pronouncements in Freedom of Information Act cases, although unfortunately some courts are not adhering to the principle under some exemptions. The new language in S. 2543 should extend this deletion principle to all cases, involving all exemptions" (120 Cong. Rec. S. 9315 (daily ed.) May 30, 1974).

stracts with names and all identifying references deleted, and submit that once such deletions are made, no "clearly unwarranted" invasion of the privacy of any cadet or former cadet would occur.

The court below correctly observed that Petitioners bear the burden of proving that disclosure of the edited abstracts would involve a "clearly unwarranted invasion of personal privacy," but "having failed to carry that burden of justification under Exemption Six in the trial court by means of affidavits or testimony, the Agency must now produce the summaries themselves in court . . . and cooperate with the Judge in redacting the records so as to delete personal references and all other identifying information" (Pet. App. A, p. 14A).

In camera inspection by the District Court will insure that the editing process is successful and that no invasion of personal privacy will occur.[5] On the other hand, the Court of Appeals noted that if, contrary to its tentative conclusion, the District Court is unable to delete identifying references, then to the extent such deletions cannot be made, the abstracts need not be disclosed. Under these procedures personal privacy will not be compromised since the redaction process will proceed under Academy and judicial supervision and, at the conclusion of that process, continuing appellate review will be available with re-

[5] In addition to the FOIA provisions, discussed above, permitting *in camera* review and the release of segregable portions of documents, subsection (a)(2) of the FOIA (5 U.S.C. §552(a)(2)), requiring, *inter alia*, publication of final opinions, statements of policy and administrative staff manuals, provides for agency deletion of identifying details "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy."

spect to any of the edited abstracts that may be ordered to be disclosed by the District Court. Such review, moreover, would be conducted with the benefit of a full factual record. At this point no court has inspected the documents claimed to be exempt from disclosure.

Once names and identifying references are deleted from the abstracts there are several practical reasons why disclosure would not result in a clearly unwarranted invasion of personal privacy. First, it would be impossible for any reader of an edited case abstract who was not previously familiar with a particular Honor or Ethics Code case to identify an individual from an anonymous version of the facts of a case. Second, only those individuals who had knowledge of the case derived from sources other than the edited abstracts would be able to make such a connection, but the number of such individuals would be small and, in any event, would be comprised solely of persons to whom the summaries would provide no new information. Third, whatever possibility there is that former cadet offenders may be identified would not be attributable to the disclosure of the edited summaries, but, instead, would result from the Academy's own practice of internally publishing summaries of cases for purposes related to cadet training and administration without deleting the names of the cadets involved.[6] By comparison with this practice, the use of anonymous

[6] Air Force Regulations provide that in determining whether public disclosure of documents would involve a clearly unwarranted invasion of personal privacy, among the factors to be considered is ". . . the degree to which an individual's privacy had already been violated." The Regulations further provide that "[t]he release of information concerning alleged misconduct that . . . has already been exposed to the public is less likely to constitute a clearly unwarranted invasion of personal privacy" (App. 122). See 32 C.F.R. §806.5(g)(2).

abstracts for scholarly purposes does not involve a clearly unwarranted invasion of personal privacy.[7]

As the Court of Appeals noted, "despite the continuing injunction of secrecy, no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty" (Pet. App. A, p. 12A). Former cadets have a right to speak about disciplinary episodes that occurred at the Academy—a right unaffected by whether or not they read anonymous case summaries. To the extent that such discussions occur among former cadets and concern matters which they might have previously agreed not to discuss, the responsibility, as the Court of Appeals indicated, lies with "the eroded . . . fabric of cadet loyalty" (Pet. App. A, p. 12A), not with the disclosure of anonymous case abstracts. In any event, speculation that such discussions might occur does not demonstrate the existence of a clearly unwarranted invasion of personal privacy within the meaning of exemption 6.

IV.

The Honor and Ethics case abstracts do not relate solely to internal personnel rules and practices.

Petitioners also claim that the case summaries fall within exemption 2, pertaining to matters "related solely to the internal personnel rules and practices of an agency." The

[7] Honor Code case abstracts are maintained in forty locations throughout the Academy to be made available to the student body, the faculty and certain of the staff. In addition, certain of the cadets who left the Academy after having been found to have violated the Honor Code have consented to have their case summaries distributed to educational institutions for instructional purposes (App. 17, 109-110).

Court of Appeals rejected this claim, recognizing that the administration of discipline at the Academy had such important implications for the general public that the case abstracts could not be understood to relate solely to the Academy's internal personnel rules and practices. As the Court pointed out, "all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets" (Pet. App. A, p. 8A).

The concept of the public's stake in the operation of the Honor Code as it affects the training of future Air Force officers originated with the Air Force Academy, not the Court of Appeals. Since the Air Force publicly proclaims the educational merit of the Academy's student administered disciplinary Code (App. 204) it should not be permitted to refuse disclosure of information essential to understanding the Code's operation.

On November 10, 1972, a White House press release noted that the President had received a report dated April 19, 1972 from the Academy's Board of Visitors. Among the recommendations made to the President by the Board and publicly announced by the White House was "that the Academy be encouraged to take steps to publicize the positive features of the role of the Honor Code in the daily activities of Cadets" (App. 200-201). Earlier, in January 1972, Lieutenant General Albert B. Clark, Superintendent of the Academy, conducted a public press conference concerning the Honor Code and disciplinary problems at the Academy (App. 204-222) and acknowledged to the press that:

> "Your interest and that indeed of the entire nation on the incident which I reported today is of course under-

> standable, the nation is entitled to the highest standard of integrity from among those young men who are here at the Academy training to positions of great trust in your Air Force in the days ahead"[8] (App. 204).

The Court of Appeals' conclusion that exemption 2 does not relate to documents concerning which there is a genuine and significant public interest is consistent with, and indeed required by, the exemption's legislative history. The Senate Report states:

> "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave and the like" (S. Rep. No. 813, *supra* at 8).

Similarly, the House Report indicates that exemption 2 does *not* cover "matters of internal management such as employee relations and working conditions and routine administrative procedures . . ." (House Rep. 1497, *supra* at 10).

The Senate Report indicates that exemption 2 was intended to eliminate the burden of assembling and maintaining for public inspection and dissemination internal documents in which the public could not reasonably be expected to have an interest. In enacting exemption 2 Congress concluded that the administrative difficulties of publishing such materials would outweigh any reasonably foreseeable bene-

[8] In addition to General Clark, other Academy officials have publicly discussed the Honor Code and the Honor System with the press (App. 217-222).

fits from disclosure. Cf. *Hicks* v. *Freeman,* 397 F.2d 193 (4th Cir. 1968); *Pifer* v. *Laird,* 328 F. Supp. 649 (N.D. Cal. 1971). The case abstracts are not documents with merely internal significance; they do not pertain to routine matters; nor is any particular administrative burden associated with their disclosure (Pet. App. A, p. 15A n. 21).

The legislative background in which exemption 2 was adopted confirms that the exemption was not intended to apply to matters of internal agency management, but to a considerably narrower category of internal matters relating to routine internal personnel considerations.

The FOIA was enacted to replace section 3 of the Administrative Procedure Act, 5 U.S.C. §1002 (1964) (hereafter the "APA") which had been criticized as a withholding rather than a disclosure statute. See *Environmental Protection Agency* v. *Mink,* 410 U.S. 73 (1973). A basic focus of the criticism was the APA's provision exempting from disclosure "any matter relating solely to the internal management of any agency."[9]

The first FOI bill to be seriously considered by the Senate, S. 1666, was divided into three sections, each with a

[9] This clause was vigorously criticized throughout the eleven years during which Congress considered freedom of information legislation. *E.g.,* Hearings Before a Subcomm. of the House Comm. on Government Operations on the Availability of Information From Federal Departments and Agencies (Part 1), 84th Cong., 1st Sess. 11, 12 (1955); 103 Cong. Rec. 7492 (1957) (statement of Senator Hennings introducing S. 2148. 85th Cong., 1st Sess.); 107 Cong. Rec. 5604-05 (1961) (statement of Senator Carroll introducing S. 1567, 87th Cong., 1st Sess.); Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary on S. 1666 and S. 1663 (in part), 88th Cong., 1st Sess. 10, 48, 56, 61 (1963); Hearings Before a Subcomm. of the House Comm. on Government Operations on H.R. 5012, *et al.* (Part 1), 89th Cong., 1st Sess. 29-30, 141, 162 (1965).

self-contained set of exemptions. The first section relied on the language of the APA to exempt from required publication in the Federal Register "any matter relating solely to the internal management of an agency." However, the second and third sections, relating to agency orders and records, respectively, exempted only information which "relates solely to the internal personnel rules and practices of any agency." The Senate Committee report on S. 1666 drew a sharp distinction between the "more tightly drawn" exempting language in the second and third sections and the internal management clause in the first section. (*Id.* at 12, 13.) S. 1666 was passed by the Senate in 1964, but the House took no action that year.

The distinction between "internal management" and "internal personnel rules and practices" was carried over to the FOI bills introduced in the 89th Congress. The bill which was introduced in the Senate in 1965 and which became law in 1966 was different from S. 1666 in that all the exemptions were consolidated into a single subsection, and the exemption for "internal management" matters was dropped (S. 1160, 89th Cong., 1st Sess.).

This legislative background indicates that Congress intended the FOIA's exemption for "internal personnel rules and practices" to be narrower than the APA's exemption for "internal management," and, as the Senate Report reflects, to relate only to routine matters such as "personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, *supra* at 8.

The House Report, upon which the Air Force's own internal personnel rules exemption is patterned,[10] permits the nondisclosure of a somewhat broader (but different) category of documents than does the Senate Report. Under the House formulation, however, there is even less basis for concluding that the Honor and Ethics case abstracts relate solely to internal personnel rules and practices. The House Report on exemption 2 states:

> "2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee rela-

[10] The Department of the Air Force Regulations implementing the Freedom of Information Act provide that documents in the possession of the Air Force which are not exempt under section 4 of the Regulations be made available upon request to any person, A.F.R. 12-30(3)(a) (App. 116).

Section (4)(b) of the Regulations, the only provision which relates to internal personnel rules and practices, exempts from disclosure the following documents:

> "Those containing rules, regulations, orders, manuals, directives, and instructions relating to the internal personnel rules or internal practices of the Air Force. Examples include:
>
> (1) Operating rules, guidelines, and manuals for Air Force investigators, inspectors, auditors, or examiners that cannot be disclosed to the public without substantial prejudice to the effective performance of a significant Air Force function. Some of these materials might reveal:
>
> (a) Negotiation and bargaining techniques
>
> (b) Bargaining limitations and positions
>
> (c) Inspection schedules and methods
>
> (d) Audit schedules and methods.
>
> (2) Personnel and other administrative matters, such as examination questions and answers used in training courses or in determining the qualification of candidates for employment, entrance to duty, advancement, or promotion" (App. 118).

tions and working conditions and routine administrative procedures which are withheld under the present law" (House Rep. No. 1497, *supra,* at 10).

Cases relying on the House's interpretation of exemption 2 have emphasized that its purpose is to prevent the circumvention of agency regulations that would occur if the procedural manuals and guidelines upon which the agency relied were disclosed to those who were the subjects of regulation. *Polymers* v. *NLRB,* 414 F.2d 999 (2nd Cir. 1969); *Cuneo* v. *Laird,* 338 F. Supp. 504 (D.D.C. 1972); see also *Tietze* v. *Richardson,* 342 F. Supp. 610 (S.D. Tex. 1972); *Concord* v. *Ambrose,* 333 F. Supp. 958 (N.D. Cal. 1971); *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787 (6th Cir. 1972); *Consumer's Union* v. *Veteran's Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot 436 F.2d 1363 (2nd Cir. 1971).

Since the Honor and Ethics Code case abstracts are disseminated within the Academy for purposes of training and instruction, their disclosure obviously cannot be thought by the Academy to permit or facilitate the avoidance of the Code's proscriptions. The only danger to Academy functions that could occur would result from a disclosure of confidential information, but that possibility is foreclosed by the deletion process ordered by the Court of Appeals. Since no confidential information will be released, disclosure of the sanitized abstracts, in the words of the Court of Appeals, "poses no such danger to the effective operations of the Codes at the Academy" (Pet. App. A, p. 9A).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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REPLY BRIEF FOR THE PETITIONERS

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1. Respondents argue (Br. 9–11) that the summaries of the Air Force Academy Honor and Ethics Code cases are not "personnel * * * files" within the meaning of Exemption 6 of the Freedom of Information Act, and accordingly that the issue whether the files are exempt from production without a further showing that their disclosure "would constitute a clearly unwarranted invasion of personal privacy" is not presented in this case. The argument apparently is that because copies of the summaries are "posted on bulletin boards" and "disseminated to other employees for didactic purposes or because of general intra-agency administrative considerations * * * they cannot reasonably be considered 'personnel files' under exemption 6" (Br. 10–11).

Respondents' argument is based upon a misconception of the nature of the summaries and the function they serve at the Air Force Academy. They are not merely utilized to enable cadets and others to be kept informed of the interpretation and application of the Honor and Ethics Codes to particular cases. To the contrary, they are the basic record of the results of the proceedings of the Honor and Ethics Committees that handle disciplinary cases at the Academy arising out of alleged violations of the Honor and Ethics Codes (App. 107, 164).

The summary is an integral part of the personnel record of a cadet against whom an Honor or Ethics Committee proceeding has been brought, and it is the official record reflecting the outcome of the proceedings. As such, it is just as much a part of the Academy's personnel records relating to cadets as the transcript of a cadet's academic grades or an evaluation of his performance of his military duties.

The Honor Committee does "not have verbatim or even summarized records of its proceedings, and the only 'records' [are] brief, one-page summarizations of each case which were provided only to the cadet honor representative from each of the forty cadet squadrons for internal purposes related to training and administration of the Honor Code by the cadets themselves" (App. 164). Thus, these documents are not summaries of Committee proceedings in the sense that one might make a summary of testimony or of an opinion or a report, but rather are the end product, the actual decision, of the proceeding itself. They are precisely the kind of records that exemption 6 intended to exempt

from disclosure as "personnel * * * files," because they are "detailed Government records on an individual which can be identified as applying to that individual * * *" (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966)).

The fact that copies of some of the summaries are distributed and used within the Academy for instructional and informational purposes [1] does not alter the

[1] Respondents state (Br. 2) that the summaries "are posted at forty different locations at the Academy * * * and * * * are available for inspection by, and discussion among, Academy cadets, faculty and administration." This statement, however, gives a distorted impression of the basis upon which the summaries are distributed and their availability for inspection by personnel at the Academy.

The summaries are not posted indiscriminately on bulletin boards throughout the Academy for all to see. Instead, a copy is distributed to the cadet Honor representative in each of the 40 cadet squadrons (App. 164). The summaries are posted on the squadron bulletin board and are covered "with a cover sheet which states 'Honor Case Summary—For Official Use Only'" (App. 177). The Academy has advised us that the squadron bulletin boards are located in restricted areas not open to the public generally. In cases where the Honor Committee finds the cadet guilty, the cadet's name is included in the summary distributed to the squadrons; if the outcome of the proceeding is not guilty or discretion, so that the cadet continues in the Academy, his name is deleted before the summary is distributed (App. 177). In the latter two categories of cases, not all summaries are distributed, but only representative ones (App. 109).

Since every cadet has the obligation to honor and enforce the Honor and Ethics Codes (App. 48, 79), it is essential that significant Committee decisions interpreting and applying those Codes be brought to the attention of all cadets. The fact that copies of the summaries are used for this purpose is fully consistent with their character as personnel files.

character of the summaries themselves as "personnel * * * files." The critical inquiry is what the documents are, not what additional functions they may serve; and, for the reasons indicated, these documents are personnel files.

Respondents also argue (Br. 9) that Air Force Regulations "sharply distinguish" between personnel and medical files and "similar" files and "unambiguously define 'similar files' to include documents like Honor and Ethics Code case abstracts." The regulation, however, merely lists among the "[e]xamples of similar files" those "[c]ontaining * * * material pertaining to personnel matters in which administrative action, including disciplinary action, may be taken or has been taken" (32 C.F.R. 806.5(g)(1)(ii)), App. 121–122). Since the regulation treats "material pertaining to personnel matters" as a "similar" rather than a "personnel" file, it is doubtful that the Air Force focused upon the distinction between these two categories with the same detailed analysis we have made before this Court. Moreover, it is far from clear that the general reference to "disciplinary action" was intended to cover the reports and unique proceedings conducted by Honor and Ethics Committees at the Air Force Academy.[2]

2. Relying upon a single passage in the House and Senate Committee Reports on the Freedom of Information Act, respondents argue (Br. 12–14) that the legislative history shows that Congress did not intend

[2] Indeed, Major Richard R. Lee, the legal adviser to the Honor and Ethics Committees, considered the summaries to be "a part of the individual cadet's personnel records * * *" (App. 160).

exemption 6 to cover all "personnel and medical files" but only those whose disclosure would involve a clearly unwarranted invasion of personal privacy. A more detailed examination of the legislative history, however, shows that Congress intended the invasion-of-personal-privacy provisions to qualify only the exemption for similar files and not that for personnel and medical files.

The predecessor bills to the Freedom of Information Act, introduced in the 85th, 86th and 87th Congresses, but on which no action was taken, all contained an exemption from disclosure for material "of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy," and made no explicit reference to personnel and medical files. S. 2148, 85th Cong., 1st Sess. (1957); S. 186, 86th Cong., 1st Sess. (1959); S. 1567 and 1907, 87th Cong., 1st Sess. (1961).,

The bill upon which the present Freedom of Information Act was based was introduced and considered in the First Session of the 88th Congress. That was S. 1666. It contained no explicit exemption either for personnel or medical files or for material whose disclosure would be a clearly unwarranted invasion of personal privacy. It required disclosure of all agency records except those: (1) specifically exempt from disclosure by statute; (2) specifically required by Executive Order to be kept secret for the protection of the national defense; and (3) constituting internal agency memoranda relating to adjudicatory and rule-making matters. This provision reflected the "belief that there was specific statutory authority in most cases to cover such things as personnel files, medical files * * *." S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964).

During Senate hearings on the bill, government agencies and witnesses objected to the absence in the legislation of a provision protecting personal privacy. See, *e.g.*, Statement of Robert M. Benjamin, Chairman of the Special Committee on Code of Administrative Procedure of the American Bar Association, Hearings on S. 1666, and S. 1663 (in part), before the Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 88th Cong., 1st Sess. 152, 157 (1963) (hereinafter 1963 Hearings). See, also, Statement of Howard Bell, Vice President, National Association of Broadcasters, 1963 Hearings, *supra*, at 88–92. Assistant Attorney General Schlei noted there was a wide "range and volume" of personal information, including personnel and medical information, in government files which would be unprotected. 1963 Hearings, *supra*, at 197–199. Many of the government agencies which commented on S. 1666 pointed to the lack of any protection of personnel and medical files from disclosure, and recommended that an exemption for such files should be added.[3] See, also, S. Rep. No. 1219, *supra*, at 11, 14.

After the hearings, S. 1666 was amended to provide an exemption from disclosure for "personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." S. Rep. No. 1219, *supra*,

[3] See 1963 Hearings, *supra*, Appendix, at 225–227 (Department of the Treasury); 254–255 (Department of Commerce); 261–263 (Department of Defense); 303–305 (National Aeronautics and Space Administration); 319–320 (Selective Service System).

at 2–3. The Committee Report explaining the amendment noted:

> In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[4] [*Id.* at 7.]

Both the language of the proposed exemption, under which the invasion-of-personal-privacy provision modified only "similar matter" and not "personnel files" or "medical files," and the Committee Reports indicate that Congress intended in that bill that personnel and medical files would be unconditionally exempt from disclosure and that similar files would be exempt only if their disclosure would clearly unwarrantedly invade personal privacy.

The Senate passed the amended version of S. 1666, 110 Cong. Rec. 17089 (1964), but the House took no action on the bill during the 88th Congress. The bill which became the Freedom of Information Act, S. 1160, was reintroduced during the first session of the 89th Congress. It made only minor changes in S. 1666, and contained the identical language now found in exemption 6: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

[4] Similarly, in the section-by-section analysis of S. 1666, the Committee Report stated that "[t]here is a general consensus that these 'personnel files' should not be opened to the public * * *." S. Rep. No. 1219, *supra*, at 14.

The only two changes the bill made in the language of exemption 6 were (1) the elimination of the commas between the three categories exempted from disclosure and the substitution of the word "and" so as to combine "personnel and medical files" into a single category (in S. 1666 they had been separate categories); and (2) the change of the third category from "similar matter" to "similar files." Neither of these changes reflects any intention to depart from the interpretation of the exemption set forth in the Senate Report on the previous bill, S. 1666, that personnel and medical reports were unconditionally exempt from disclosure.[5]

To the contrary, during the hearings on S. 1160, several agencies interpreted the language as providing an absolute exemption for personnel and medical files.[6]

[5] But see Davis, *Administrative Law Treatise*, § 3A.22, n. 94 (1970 Supp.), suggesting that the change from "similar matter" in S. 1666 to "similar files" in S. 1160 indicates that Congress rejected the view that "personnel and medical files" were to be treated differently from "similar files." We submit, however, that this minor change in language does not indicate that Congress intended to make that significant a change in the meaning of the exemption. Throughout its consideration of exemption 6, Congress was far from precise in labelling what type of information besides personnel and medical files was exempt. The Senate Report on S. 1666, S. Rep. No. 1219, *supra*, at 7, speaks of "similar record" being exempt, although the actual text of the exemption reads "similar matter." *Id.* at 17. Rather than altering the meaning of the exemption, the change to "similar files" was more likely intended to make the language of the exemption consistent.

[6] See Hearings on S. 1160, et al., before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), Appendix and Exhibits, at 376 (comments of Comptroller General of the United States), 491 (comments of National Labor Relations Board), 495–496 (comments of Railroad Retirement Board).

Similarly, the Reports of both the House and Senate Committees support that view. See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Thus, the Senate Committee again noted, as did the earlier Report (S. Rep. No. 1219, *supra,* at 7), the great number of files containing personal information in the possession of such agencies as the Veterans' Administration, the Department of Health, Education, and Welfare and the Selective Service System, and stated that, rather than providing a specific statutory exemption for each agency, the Committee decided upon a privacy exemption covering all agencies. S. Rep. No. 813, *supra,* at 9. In explaining the general purpose of the bill, the Committee stated (*id.* at 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as *medical and personnel records.* [Emphasis added.]

This legislative history shows: (1) that exemption 6 was inserted in the Freedom of Information Act because of apprehension that the earlier bills did not protect the confidentiality of personal matters in government files, including particularly personnel and medical material; (2) that the original text of exemption 6 provided an unconditional exemption for personnel and medical files and an exemption for those similar files whose disclosure would constitute a clearly unwarranted invasion of personal privacy; and (3) that exemption 6 as enacted, despite the minor

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changes in its text, was intended and understood to embody the same principle as the earlier version. Indeed, if invasion of privacy were the touchstone for all categories of material that exemption 6 covers, there would have been no need for Congress to have referred to personnel and medical records at all; it could simply have provided an exemption for all "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[7]

3. In response to our argument (Br. 17–22) that

[7] Respondents suggest (Br. 14) that if personnel and medical files are unqualifiedly exempt from disclosure, the government could avoid disclosure of non-confidential material by placing it in such a file. The courts, however, may examine *in camera* a personnel or medical file for the limited purpose of insuring that all the material therein is properly a part of such file. Cf. *Center for National Policy Rev. on Race & Urban Issues* v. *Weinberger*, 502 F. 2d 370, 375 (C.A.D.C.).

Respondents also contend (Br. 12) that three court of appeals decisions have held that personnel and medical files are exempt only if their disclosure would clearly unwarrantedly invade personal privacy. None of those cases, however, involves the distinction here involved between personnel and medical files on the one hand, and similar files on the other. All of them involved the disclosure of similar files.

Respondents endeavor to answer our point (our opening brief 13–14) that one reason that Congress provided an ~~unwarranted~~ unqualified exemption for personnel and medical files was the vast number of such files by stating (Br. 11, n. 3) that the personnel files to which we refer "are expressly protected by the Privacy Act of 1974 (Pub. L. 93–579, 88 Stat. 1896, 5 U.S.C. § 552(a))." Section 3 of the Privacy Act, 5 U.S.C. 552a(b)(2), however, prohibits agencies from disclosing personal information pertaining to an individual without the individual's consent, "unless the disclosure of the record would be—* * * (2) required under section 552 of this title." To the extent that personnel files are required to be disclosed under the Freedom of Information Act, they are not protected by the Privacy Act.

disclosure of the summaries would constitute "a clearly unwarranted invasion of personal privacy," respondents argue (Br. 19) that the "possibility" that "former cadet offenders may be identified would not be attributable to the disclosure of the edited summaries, but, instead, would result from the Academy's own practice of internally publishing summaries * * *." As the court of appeals correctly observed (Pet. App. 11A–12A), "[t]his approach, however, ignores certain practical realities," since—

> a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information. [Footnote and citation omitted.] For example, a senior officer and ex-cadet might, upon reading a summary or a reference to it, realize for the first time that a man under his command had once been the subject of Academy discipline. It would be cold comfort to the junior officer to be told that his chief had always "known" this fact anyway, although he had long forgotten it or had never made the ultimate connection among various bits of knowledge until the article jogged his recollection.

It is respondents' intention to make the summaries public, and not the Academy's limited distribution of them, which would create the real risk that dormant memories would be revived, and former cadets thereby suffer potentially devastating consequences (App. 157, 186).[8]

[8] Respondents imply (Br. 20) that this case involves a former cadet's "right to speak" about Honor or Ethics Code violations. But maintaining the confidentiality of the summaries does not prevent any former cadet from himself describing or discussing disciplinary episodes that occurred at the Academy.

4. Respondents contend (Br. 23) that exemption 2, which exempts from disclosure matters "related solely to the internal personnel rules and practices of an agency," was intended to cover only "internal matters relating to routine internal personnel considerations." They stress (Br. 24) that S. 1666 exempted from publication in the Federal Register "any matter relating solely to the internal management of an agency" and exempted from general disclosure material that "relate[s] solely to the internal personnel rules and practices of an agency;" and that the explicit exemption for "internal management matters" was eliminated from the bill that was enacted. They infer from this deletion that "Congress intended the FOIA's exemption for 'internal personnel rules and practices' to be narrower than the APA's exemption for 'internal management,' and, as the Senate Report reflects, to relate only to routine matters such as 'personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like' " (*ibid.*).

The "internal management" provision in S. 1666, however, was not an exemption from the general disclosure requirements of the Act but only from the requirement of publication in the Federal Register. Moreover, even if Congress intended the exemption for "internal personnel rules and practices" to be narrower than "internal management," that does not indicate that the former is intended to cover only such routine matters as the use of parking lots and sick leave. The phrase "internal personnel rules and practices" means what it says and, as developed in our

opening brief (pp. 22–26), the summaries deal with an important part of the Air Force Academy's internal personnel rules and practices, namely, those involving the observance and enforcement of the Honor and Ethics Codes.

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